No. 22,162

IN THE

United States Court of Appeals

For the Ninth Circuit

Joseph E. Seagram and Sons, Inc., The House of Seagram, Inc., McKesson and Robbins Incorporated, Barton Distilling Company and Barton Western Distilling Co.,

Appellants,

vs.

Hawaiian Oke and Liquors, Ltd.,

Appellee.

On Appeal from the United States District Court for the District of Hawaii

APPELLEE'S BRIEF

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Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

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I

PRELIMINARY STATEMENT

This is an appeal pursuant to 28 U.S.C. §1291 from the judgment of the District Court for the District of Hawaii entered on June 2, 1967 (R. 307) in favor of appellee based upon a jury verdict of $65,000 which after trebling and allowances for attorneys' fees and costs was $246,-

938.34. (R. 307.) Appellants have appealed from that judgment based upon the trial court's denial of their motions for (1) a directed verdict (R. 279-282) and (2) judgment *n.o.v.* and/or new trial (R. 300-302). These motions were, in turn, made upon appellants' assertions of insufficiency of evidence, errors in the admission and rejection of evidence and errors in the instructions to the jury, as more specifically set forth and answered herein.

II

STATEMENT OF THE CASE

A. The Parties and the Industry.

Appellee Hawaiian Oke & Liquors, Ltd. (Hawaiian Oke) brought this action to recover treble damages under Section 4 of the Clayton Act (Title 15 U.S.C. §15) for injury resulting from appellants' violations of the antitrust laws. Hawaiian Oke contended it was damaged by a "combination . . . or conspiracy, . . ." which eliminated it from the wholesale liquor distribution business in Hawaii. The alleged participants in the combination were:

- Joseph E. Seagram & Sons, Inc. (Jos. E. Seagram);
- Calvert Distillers Company (Calvert), a division of House of Seagram, Inc. (House of Seagram);
- Four Roses Distillers Company (Four Roses), a division of House of Seagram;
- Frankfort Distillers Company (Frankfort), a division of House of Seagram;
- McKesson & Robbins, Inc. (McKesson);
- Barton Distilling Company (Barton); and
- Barton Western Distilling Co. (Barton Western), a wholly-owned subsidiary of Barton.

Joseph E. Seagram & Sons, Inc. is the parent (manufacturing) company of its wholly owned marketing subsidiary, House of Seagram, Inc. The President of Joseph E. Seagram is Edgar Bronfman; Jack Yogman is his Executive Vice-President. The House of Seagram is divided into six (6) unincorporated divisions which are suppliers of various types and brands of liquor products. (Exh. S-17.)

The evidence established that each of the above divisions were "autonomous"; that each was referred to as a "company". Edgar Bronfman testified that each division had its own chief executive and that these men operated autonomously. (Tr. 948-49.) Furthermore, he stated that the marketing of products was left "autonomously" to the various divisions. (Tr. 961.) Arthur Murphy (President of Calvert) testified that each division had a separate responsibility to market and advertise its own products. (Tr. 2646.) Each has separate officers and its own chain of command. (Tr. 2647.)

Yogman testified that the various divisions are self-contained competing units which fight each other as hard as they fight other (*i.e.*, non-Seagram affiliated) competitors. (Tr. 971.) As Murphy stated, each division competes in selling through various distributors. (Tr. 2647.) It is also important to note that normally each division makes an individual and independent decision as to whom its distributors will be. (Tr. 2648.) Moreover, each division makes its own independent pricing decisions. (Tr. 2648.) In short, as R. Flint (Executive Vice-President of Frankfort) testified, referring to other House of Seagram divisions, "They run their business and we run ours." (Tr. 1577.)

The House of Seagram, through its divisions, sells various types of liquor products—straights and blends, vodka, gin and rum to distributors who resell to retail package stores, bars and others. The evidence in this case showed that there were, during the time involved, approximately seven major distributors of liquor products in the State of Hawaii. (Tr. 2367-68.) Of these, the largest was appellant McKesson, a national company having liquor distributorships in major cities throughout the United States, many of which handle products of Seagram divisions and/or Barton. (Tr. 326-27.) In Hawaii, McKesson was a competitor of the appellee Hawaiian Oke, which was, itself, one of the major distributors of liquor products in that State.

Hawaiian Oke was, *inter alia,* the wholesale liquor distributor, in the Hawaiian Islands, for the products of Calvert, Four Roses, Frankfort, Barton and Barton-Western.[1] The lines of these various distillers accounted for a significant portion of Hawaiian Oke's total sales in 1964-65. (Exhibits P-106 through P-114.)

B. The Combination and Conspiracy.

1. The Genesis of the "Plan".

On June 3, 1965, there was a meeting in Calvert's New York City offices, followed by a luncheon meeting at a nearby restaurant. In attendance at these meetings were

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[1]The appellee was the exclusive distributor, in Hawaii, for Calvert products from January, 1963 to August, 1965 (Tr. 447, 454-455); for certain Four Roses products from the mid 1930's to August, 1965 (Tr. 1062; Exh. P-110); for certain Frankfort products from 1961 to August, 1965 (Tr. 1558); and for Barton and/or Barton Western products from 1961 to August, 1965 (Tr. 1071; Exh. P-113).

Jack Yogman, an executive vice president of Joseph E. Seagram & Sons, Inc.; Arthur Murphy, President, and Al Fleischman, National Sales Manager of Calvert; Joseph Cotler, Vice President; James J. Maloney, Western District Manager, and Abe Kauhane, Hawaii Division Manager of McKesson. (Tr. 342-44, 664-674, 2375-2380, 2638-2640.)

Yogman testified that it was at the June 3 meeting that he first became aware of "specific talk of a plan" that McKesson might open a second distribution house in Hawaii. (Tr. 976.) *McKesson had never before undertaken to open a new second house.* (Tr. 622-3.)[2]

Maloney (McKesson) testified that the idea of a second house "was probably a mutual agreement" between the McKesson, Calvert and Jos. E. Seagram representatives at the June 3 meeting. (Tr. 669.) However, on July 7, 1965, Maloney wrote (to Cotler) ". . . that we [McKesson] should start putting the pressure on Jack Yogman, if not Edgar Bronfman [President, Jos. E. Seagram & Sons], who actually asked us to get into this deal." (Exh. P-72; Tr. 728.)

2. The Desirability of a Second House and the Need for Additional Lines.

Cotler (McKesson) testified that Murphy (Calvert) initiated the idea of a second house. (Tr. 343-344.) The creation of a second house was deemed necessary because McKesson was already distributing "7-Crown" and

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[2]McKesson had dual houses in Miami but only because it had acquired a second house which was already in existence. (Tr. 325-335.)

"V.O." for the Seagram Company (another division of the House of Seagram). (Tr. 669.) Seagram is McKesson's chief supplier in Hawaii (Tr. 1491) and "7-Crown" is the leading selling blended whiskey in the state. (Tr. 2397.) Calvert, then, would be understandably reluctant to have its line—which directly competes with "7-Crown" and "V.O."—distributed by the same wholesaler. As Murphy testified, he wanted Calvert in a house where it would be a "primary brand". (Tr. 1441.) Murphy ". . . wouldn't have made the move unless a separate sales organization was created by the McKesson people". (Tr. 1441.) McKesson likewise preferred to have separate houses for the distribution of these competing lines. (Tr. 669.)

Had this been all that transpired, the present case would never have arisen. However, it was at this point that, appellee contends, the anti-competitive combination began to take shape.

At the June 3 luncheon meeting, McKesson told Seagram and Calvert representatives that if a second house was to be created it would be necessary for that house to have additional lines, an economic fact well known to all of them. (Tr. 2595; 2667-8.) Calvert alone would not be enough to support the new house. (Tr. 671.) Indeed, Maloney (McKesson) felt that the Calvert line was somewhat of a gamble, "an unknown quantity". (Tr. 734.) It was his opinion that McKesson was doing Seagram a favor—". . . taking problems off their hands . . ." (Exh. P-72; Tr. 733)—by taking on the Calvert line. At the June 3rd luncheon meeting, Maloney specifically asked Yogman (Jos. E. Seagram & Sons) to help McKesson get

the other House of Seagram lines for the new house. (Tr. 732-3.)

In this light, when we reconsider Maloney's July 7 memo asking Cotler to "start putting the pressure" on Yogman ". . . who actually asked us to get into the deal" (Exh. P-72), it is reasonable to infer, appellee contends, that Yogman and/or other Seagram representatives agreed to help McKesson secure other lines for the second house.

Yogman (Tr. 976) and Fleischman (Tr. 2595) testified of their awareness of the second house's need for additional lines. Murphy, President of Calvert, was not only aware of this need but was "concerned" about it. (Tr. 2667-8.) He knew that without additional lines a second McKesson house, distributing his line, would never come about; therefore, even at this early date, the Four Roses line was mentioned as one possible additional line for the new house. (Tr. 2667-8.) Thus, the beginning of a horizontal combination among suppliers was taking shape. One supplier (Calvert) and the parent company (Joseph E. Seagram & Sons) had realized the need for joint action between various suppliers, and were already considering combining for such joint action with another supplier, Four Roses.

3. McKesson's Role in Organizing and Promoting the Concerted Termination (Group Boycott) of Hawaiian Oke.

After the luncheon meeting with the Seagram and Calvert representatives, the McKesson officials adjourned to Cotler's office for an internal meeting. McKesson knew that the loss of Calvert would hurt Hawaiian Oke. (Tr. 2446.) At this time Cotler, Maloney and Kauhane dis-

cussed the feasibility of opening the second house and talked of having the Barton, Four Roses and Frankfort lines, as well as Calvert. (Tr. 342-49.) Significantly, *all of the lines then discussed were distributed by appellee, Hawaiian Oke.* This evidences the early stages of a plan by McKesson to have various suppliers join in terminating business dealings with Hawaiian Oke.

Shortly thereafter, on June 7, 1965, Kauhane sent a memo to Maloney specifying the lines which the McKesson executives had discussed and ". . . decided to include under . . ." the new house. (Exh. P-71; Tr. 687.) The brand names right at the top of the list—and the two which would be expected to produce a major portion of the new house's case sales volume—were Calvert and Barton. Also mentioned were Frankfort and Old Mr. Boston. The thrust of the June 7 memo was that the second house would survive by distributing a combination of some lines which were already committed to McKesson's primary house and those lines distributed by Hawaiian Oke. (Tr. 687-693.) The tenor of that June 7 memo again evidences an intent on the part of the McKesson organization to prey upon the sources of supply of Hawaiian Oke. There is no indication that McKesson was seeking new business on a general basis, in open competition, from any of the other major liquor distributors in Hawaii. Instead, after the meeting with the Calvert and Jos. E. Seagram officials, McKesson directed its efforts in a secretive, *sub rosa* attack on appellee's sources of supply (Tr. 777.) This is even more clearly demonstrated by the last numbered paragraph of the aforementioned June 7 memo (Exh. P-71), where Kauhane (McKesson) asks:

"(a) When will Hawaiian Oke be told of their loss of lines? . . .

"(c) If we bought Hawaiian Oke, what would Seagram say about Old Mr. Boston?" (Tr. 688.)

The entire arrangement, including the prospect of eliminating appellee as a competitor, was a desirable one to McKesson for many reasons. Calvert was preparing to market a new Hawaiian Rum (Leilani). Appellee, as Calvert's distributor, would have been given the Leilani line. (Tr. 1641.) With the projected increase in tourism in Hawaii, and the popularity of rum drinks there, McKesson officials realized that this new rum line would be a profitable item. (Tr. 345-6.) Moreover, Kauhane (McKesson) was most happy at the prospect of taking on the Calvert line because more lines and more volume would mean "more money" for McKesson. (Tr. 2377.)

Perhaps one of McKesson's strongest motives was its desire to control the lower priced Barton line, which had grown substantially since Hawaiian Oke had taken it over from McKesson several years earlier. (Tr. 1071; Exh. P-113, P-114.) McKesson was interested in distributing a low price whiskey in Hawaii (Tr. 1513-15; Exh. P-73), and was especially attracted to the Barton and Old Mr. Boston lines which appellee was distributing. (Exh. P-71; P-74; Tr. 1514-1517.) In April 1965, Maloney suggested that E. S. Chang (then McKesson's assistant sales manager in Hawaii) contact Barton Distilling Co. regarding a lower priced whiskey. (Tr. 1516-17; Exh. P-74.) And Chang communicated with Sheldon Friedman (Barton's Western Division Manager). (Tr. 1518.) Of course, at

that time, Barton's distributor in Hawaii was the appellee. But a month later, in early June, McKesson was still thinking of taking the Barton line from Hawaiian Oke. (Tr. 342-49.) And, appellee contends, with the idea of a new house, and the opportunity which it presented for putting together a planned horizontal combination of various suppliers refusing to deal further with Hawaiian Oke, McKesson saw the opportunity to make Barton a part of this plan. McKesson was most successful—as is evidenced by the developments which followed: Barton did join the plan with Calvert, Four Roses and Frankfort to terminate Hawaiian Oke. (Tr. 157, 160, 165); Hawaiian Oke was so shattered by this massive loss that it was eliminated as a distributor of liquor in Hawaii; Barton did become extremely important to McKesson's second house—sales of Barton products have accounted for nearly one-half of the new house's total income (Tr. 1079-92; Exh. P-17); and in 1966, sales of all of Hawaiian Oke's former suppliers accounted for 87.4% of the new house's total case depletions of liquor. (Tr. 1088; Exh. P-17B.)

4. The Mechanics of the Conspiracy: The Need for and Existence of Concerted Action by the Appellants.

The facts detailed above establish that both McKesson and Calvert were anxious to see the second house become a reality. But both knew that this could never come about unless other lines joined Calvert in the new house. McKesson was especially desirous of controlling the Barton line and securing it as a major supplier for its second house. Also, the jury could reasonably have found that Yogman and Murphy set out to recruit other Divisions of the House of Seagram into the fold of the new house.

Indeed, in light of the mutual recognition of the need for additional lines, and the specific mention, at an early date, of Barton, Calvert, Four Roses and Frankfort, appellee contends that the jury could have inferred that McKesson would open its second house only if these particular lines would agree to jointly terminate Hawaiian Oke in favor of the new house.

There was clear evidence of discussions between the various heads of the three Seagram Divisions involved. The top executives of these Divisions officed only steps apart in the same Park Avenue building in New York City. (Tr. 980.) Also, the Western Division managers of Calvert, Four Roses and Frankfort officed in the same Los Angeles building, 3540 Wilshire Boulevard. (Tr. 1265.) Edgar Bronfman, President of Jos. E. Seagram, testified that he could not say that these Division executives did not discuss a mutual plan to terminate Hawaiian Oke. (Tr. 968-969.) Indeed, Maloney's memo to Cotler requesting that he "start putting pressure" on Yogman and Bronfman pursuant to some "deal" which they instigated (Exh. P-72) could reasonably have led the jury to believe that the officials of Jos. E. Seagram as well as Murphy and Fleischman of Calvert had agreed to directly aid McKesson in securing additional Seagram lines.

J. Wishney (President of Four Roses) admitted conferring with Murphy after hearing of McKesson's second house proposal. (Tr. 1306-1309.) R. I. Flint (President of Frankfort) indicated to his Western Division Manager, J. Flick, that he had learned of the second house proposal through discussions with Murphy and Wishney. (Tr.

1582.) Significantly, there was no evidence that Flint had even talked to any of the McKesson people prior to his agreeing to terminate Hawaiian Oke in favor of the new McKesson house.

The fact that there were dealings and agreements in the Park Avenue office building is evidenced by Kaufman's (Four Roses) letter of June 30, 1965 to Kauhane (McKesson). (Exh. P-77.) Kaufman's allusion to "marriages . . . made in heaven. . . ." clearly meant that the decision to terminate Hawaiian Oke was made by the New York office. (Tr. 1451.) This decision by Four Roses was made only one month after it had sent an annual renewal contract to Hawaiian Oke. (Tr. 1444.)

Barton was an extremely important component in this concerted plan. In light of McKesson's interest in acquiring the lower priced Barton lines (dating back to April, 1965; contact with Barton in May, 1965; mention of Barton at the later June 3, 1965 meeting; and inclusion of Barton as one of the additional lines for the new house in the June 7, 1965 memo), the jury could have reasonably inferred that McKesson would not have gone forward with a second house unless it was assured of getting the Barton line. Moreover, the jury could well have found that Seagram was aware of this proposed combination from the tenor of Kauhane's (McKesson) June 7, 1965 memo regarding new lines: "Joe C. [Cotler] suggests to clear the whole matter with Seagram. . . ." (Exh. P-71.)

At the June 3, 1965 McKesson meeting, Cotler gave Maloney the responsibility of getting the Barton line, because Maloney regularly did business with Barton in

California. (Tr. 702-703.) In fact, McKesson was Barton's chief distributor in California. (Tr. 766.) Soon after Maloney returned to his San Francisco office from New York, he talked, by telephone, with Sheldon Friedman (Barton's Western Division Manager) in regard to the proposed second house. Maloney wanted the Barton line, and specifically inquired as to the possibility of Barton bottling a special lower priced whiskey for the new house. (Tr. 705-708; 766-768.) Friedman listened to the proposal, but made no decision, choosing to "wait and see developments." (Tr. 706-707.)

At this time, McKesson had not yet agreed to open the second house. (Tr. 770.) Maloney told Friedman that Calvert was willing to terminate Hawaiian Oke if McKesson opened a second house. (Tr. 770.) There was a conflict in Friedman's testimony as to his knowledge about Four Roses' and Frankfort's intentions to join Calvert in terminating Hawaiian Oke. In an earlier deposition, Friedman admitted knowledge that Four Roses, Frankfort and Calvert were considering termination of Hawaiian Oke; he denied this knowledge in court. (Tr. 774, *et seq.*) Hence the jury could have inferred that Maloney let it be known to Friedman that high officials in the Seagram organization were attempting to induce Four Roses and Frankfort to join Calvert in a concerted termination of the appellee.[3]

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[3]In *Girardi v. Gates Rubber Co.*, 325 F.2d 196, 203 (9th Cir. 1963) this Court stated that when a witness refuses to acknowledge a prior incriminating document, ". . . the jury, observing him and his manner of testifying and his interest could well disbelieve his testimony and believe that his written statement . . . was a true one."

Following his conversation with Maloney, Friedman discussed the McKesson proposal with his superior in Barton's Chicago office, Sidney Weinstock. (Tr. 768.) Approximately one week later, Weinstock flew into San Francisco, and on June 14 or 15 met with Friedman and Maloney. (Tr. 768-769.) Here it is important to note that Friedman and Weinstock were asked to keep the "second house" plan confidential, and they did not subsequently divulge the information to Hawaiian Oke even though it was admitted that they knew and realized that Hawaiian Oke's loss of the Calvert line would have an effect on the distribution of Barton's products in Hawaii. (Tr. 777.) This "secrecy agreement", then, could have been taken by the jury as further evidence of a conspiracy and of Barton's willingness to be a part of the plan for combined action to terminate the appellee.

It was only after this mid-June meeting that Maloney called Kauhane with a "go ahead" for McKesson's second house in Hawaii. (Tr. 2477.) The jury could have reasonably inferred that this mid-June meeting between Barton and McKesson officials culminated in Barton's agreement to join Calvert and other suppliers in the plan to terminate Hawaiian Oke. This, appellee contends, was the final development which McKesson desired, and needed; thus at this time McKesson made the decision to open the second house. (Tr. 675-76.) Although appellants contended that Barton's decision to terminate Hawaiian Oke was not made until July 7, the evidence is to the contrary. On June 29, Kauhane (McKesson) wrote Friedman (Barton):

> "Dear Sheldon:
>
> "Will you please advise me if you have informed Hawaiian Oke and Liquor Company about the break with them for the Barton line. If you have not informed them as yet, could you please advise me when you will".

(A carbon copy of this letter was sent to Maloney.) (Exh. P-88) Thus, the jury may have reasonably drawn the inference that after Maloney's mid-June meeting with the Barton people, Kauhane was informed that Barton had agreed to join the plan to enter the new house conditioned on anticipated similar action by Calvert, Four Roses and Frankfort. McKesson, then, had successfully extracted conditional agreements from four of Hawaiian Oke's suppliers that each would terminate appellee as a distributor if the other suppliers involved in the plan would do likewise.

C. The Termination of Appellee Was Pursuant to a Combination and Not the Result of Independent Business Decisions by the Appellant Suppliers.

As their principal "defense", appellants urged at trial that each of the four suppliers' (Calvert, Four Roses, Frankfort and Barton) termination of Hawaiian Oke was an independent decision based upon sound business judgment.[4] Each supplier's argument consisted of an assertion that Hawaiian Oke did a poor job as a distributor, and, in the case of Barton, it urged additionally that Hawaiian Oke was a poor credit risk.

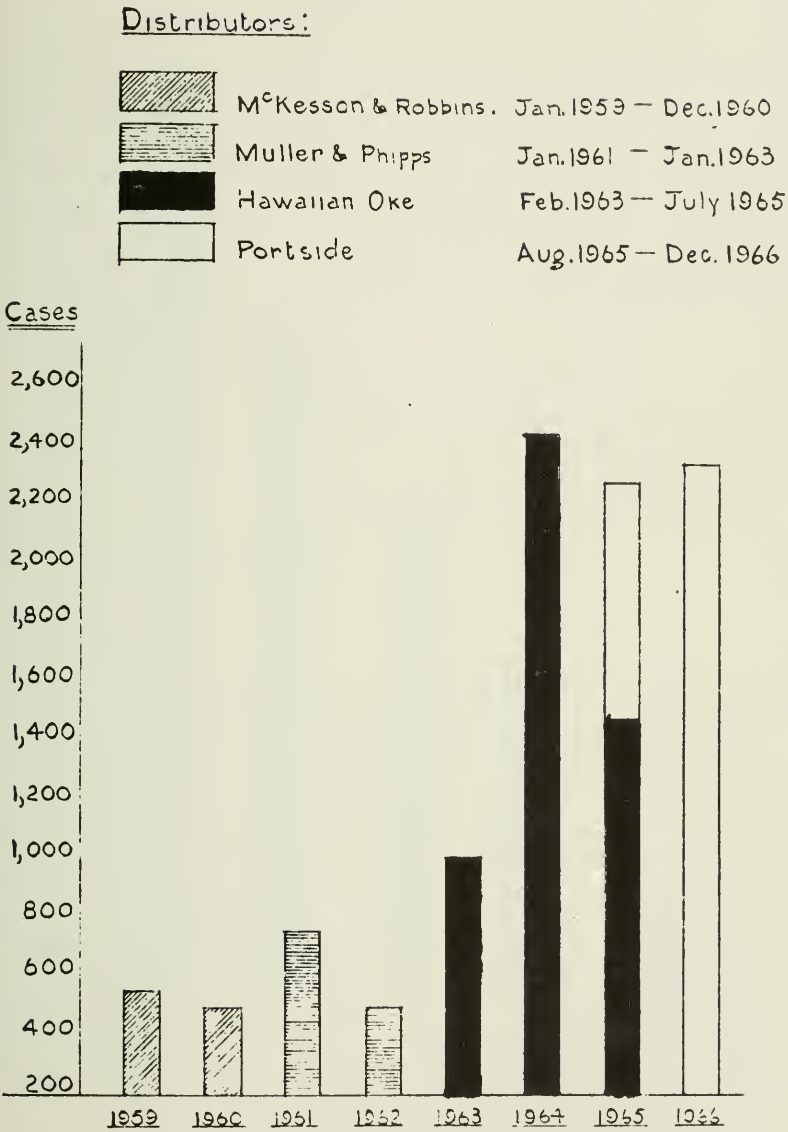
[4]This is not really an affirmative defense, it is a denial of the alleged combination.

There was a great deal of evidence received relating to these questions. Indeed, as the trial unfolded it became increasingly apparent that the critical issue to be determined by the jury was (as the court ultimately instructed) whether the termination of Hawaiian Oke was pursuant to a combination or the result of independent action based upon individual business judgment. The jury resolved the fact dispute in favor of appellee. That finding is amply supported by evidence on the basis of which the jury could have—and obviously did—reject the "independent business judgment" defense tendered to them.

(a) Calvert.

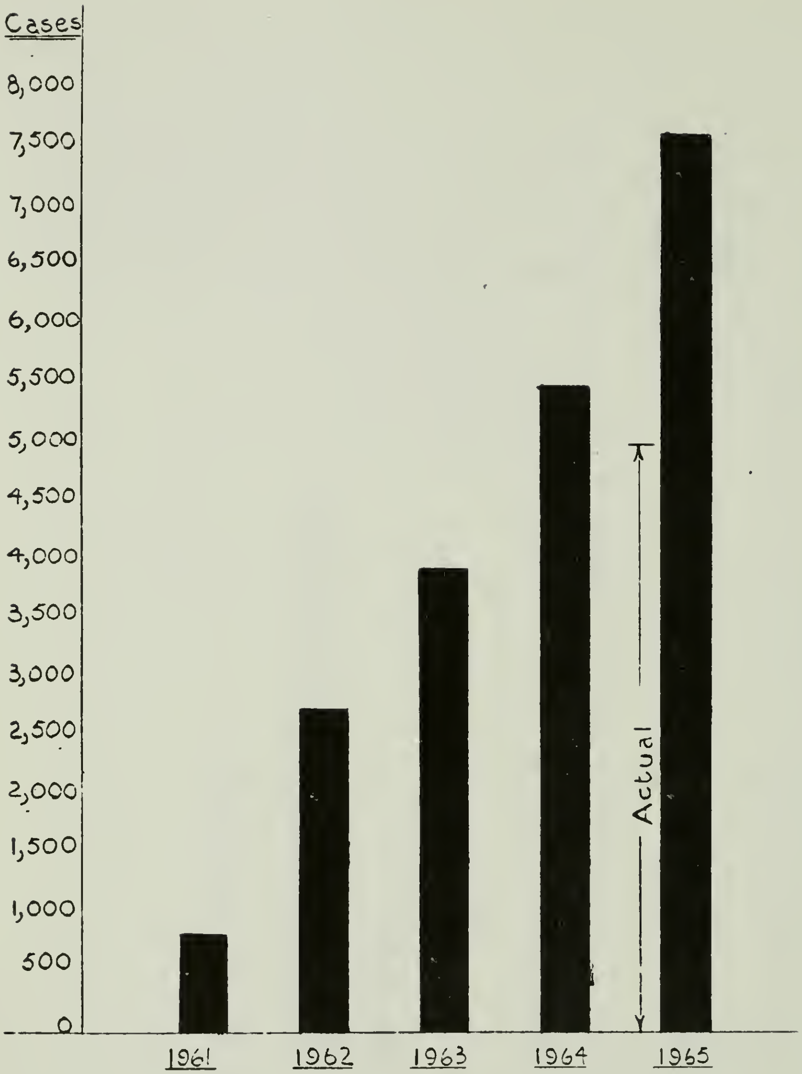
Appellants offered evidence to show that Hawaiian Oke was not an effective distributor of Calvert products. Contrary evidence offered by appellee, however, provided a basis upon which the jury could easily have concluded that appellants' evidence regarding Calvert was essentially an "afterthought." For example, appellee demonstrated that its distribution of Calvert products from 1963 (when it took on the line) until July, 1965 (when it was terminated) was far superior to prior and subsequent distributors of Calvert. (See the chart, opposite page, Exh. P-109.)

Moreover, Arthur Murphy, President of Calvert, repeatedly complimented Ted Wong and the Hawaiian Oke organization for its sales performance with Calvert. (Exh. P-59 and P-65; Tr. 2660.) In June of 1964, Emilio Gonzales, then national sales manager for Calvert's Leilani Rum, had noted the significant improvement in the Hawaiian Oke operation and was satisfied that appellee was doing a good job for Calvert. (Tr. 1659.) Indeed, Gon-



Depletions — Calvert Extra
Calvert Reserve, Lord Calvert,
& Calvert Gin.

(Exhibit P-109)



Hawaiian Oke Depletions
Barton & Barton Western

(Note: Full Year 1965 is Projected
By Dividing Actual Depletions To Aug. 31st 1965
By Eight & Multiplying Result By Twelve.)

(Exhibit P—113)

zales indicated that appellee was to be the Hawaiian distributor for the new Leilani Hawaiian Rum line (Tr. 1651), which was expected to be a highly profitable item and which was extremely attractive to McKesson. (Tr. 345-346.) Moreover, Gerald Novak, Western Division Manager for Calvert, also expressed satisfaction with Hawaiian Oke's performance. (Tr. 1260.) As late as May 8, 1965, Novak again expressed approval in regard to Hawaiian Oke's distribution of Calvert products. (Tr. 2580; McKesson Exh. 39.)

The repeated commendation of appellee's performance—supported solidly by a statistical analysis of excellent sales performance, afforded the jury a more than ample basis upon which it could have rejected Calvert's "poor performance" contention.

(b) Barton.

The experience with Barton products also illustrated to the jury the lack of business reasons for the termination of Hawaiian Oke. (See chart, opposite page, Exh. P-113.)

In 1961 Hawaiian Oke depletions of Barton and Barton Western items totaled only 758 cases. By 1964, however, Hawaiian Oke's annual depletions of Barton and Barton Western products totaled 5,401 cases, an increase of nearly 700%. (Tr. 1071.) At trial, Barton argued that Hawaiian Oke's sales reflected an unusually large proportion of the less profitable "white goods" (gin, vodka, etc.). Yet the evidence reflected the fact that Barton had specifically requested Hawaiian Oke to increase its depletions of such white goods. (Exh. P-116.) Moreover, Hawaiian Oke's white goods ratio was not unduly high;

sales of the more profitable "brown goods" (whiskey, blends, *etc.*) were increasing both proportionately and in volume; and Hawaiian Oke's ratio of "brown goods"—"white goods" depletions was much better than either McKesson's pre-1961 performance or Portside's 1966 ratio. (Exh. P-19, P-116, P-117; Tr. 813-817, 1368.)

Barton also argued that a major reason for cancellation of Hawaiian Oke was the latter's delay in paying its bills. The jury may well have disbelieved this contention, however, in light of evidence introduced by appellee showing that Barton urged Hawaiian Oke to "load up" on merchandise because of an imminent increase in taxes. Barton indicated that a greater amount of time would be extended to Hawaiian Oke to pay for this unusually large purchase. (Exh. P-103, P-104.) Indeed, Mr. Ettlinger (Executive Vice President, Barton) couldn't deny that these solicited "tax scare" purchases were the basis for the alleged credit difficulties of Hawaiian Oke and admitted that all of these bills were paid during 1963. (Tr. 1373-1377.) (See also Tr. 888.) Moreover, Barton's contention that Hawaiian Oke had been deficient in meeting its obligations was in part based on its assertion that its credit terms, in many instances, extended for only sixty days. Yet it was shown that Hawaiian Oke had actually been extended ninety-day credit terms. (Exh. B-48.) Barton's Western Division Manager, Sheldon Friedman, admitted that from "the beginning of 1964 onwards" Hawaiian Oke's record of payments ". . . might have been improving." (Tr. 888.) Indeed, Friedman admitted that at the time of the termination he was happy with Hawaiian Oke. (Tr. 793.) Moreover, when asked by Ted Wong the reason for Barton's termination of Hawaiian Oke, Fried-

man conjectured that it was because of a possible "deal" between Barton and McKesson on "the West Coast" (Tr. 167-168), rather than for any economically sound business reason.

(c) Four Roses.

In April of 1965, two short months prior to Four Roses' mysterious decision to cancel Hawaiian Oke in favor of McKesson's Portside as its island distributor, Four Roses had noitified McKesson that Hawaiian Oke was to be the exclusive distributor of Kessler and that McKesson was to be cancelled as a co-distributor of that line. (Tr. 1302; Exh. P-111.) This April, 1965 decision by Four Roses was partially based on McKesson's poor performance. (Tr. 1302.) *Moreover, in the middle of May, 1965, Four Roses sent to Hawaiian Oke a renewal contract.* (Tr. 1444.) Yet, one month later Hawaiian Oke was terminated in favor of a yet not fully developed division of McKesson. Exhibit P-110 indicates that Hawaiian Oke's 1964 sales of Four Roses exceeded the 1966 performance of Portside. Finally, Kaufman (Four Roses) himself, in his letter (Exh. P-77) and testimony (Tr. 1444-46), cast suspicion on the reasons behind his company's termination of appellee. Therefore, the jury could have reasonably rejected the factual contention that Four Roses terminated Hawaiian Oke on the basis of sound business reasons.

(d) Frankfort.

The lack of an independent business reason for the termination of Hawaiian Oke is also apparent in the case of the Frankfort line. Frankfort's Western Manager, Flick, testified that earlier distribution of its McKenna

label by McKesson was unsatisfactory. (Tr. 1580-1586; Exh. P-83.) Flint, Vice President of Frankfort, did not even discuss the economic or competitive advantages of a change in distributorship with McKesson officials. Instead, he decided to terminate Hawaiian Oke *because Calvert and Four Roses were doing so.* (Tr. 1582.)

The Frankfort executives indicated that the quality of a distributor's sales staff is always a matter of concern to the supplier. (Tr. 1599-1600.) Yet, at the time Frankfort terminated Hawaiian Oke and agreed to go along with the new house "plan", Portside had no sales staff or sales manager. Indeed, on July 2, 1965—approximately two weeks *after* making the decision to go with Portside—Flick (Frankfort) wrote Maloney (McKesson) seeking information as to who the new sales manager would be, the names and number of salesmen on the sales staff, and the address of Portside. (Exh. P-84; Tr. 1589.)

D. Injury Suffered by Hawaiian Oke.

A great deal of economic data was presented to the jury regarding the damage to appellee's business as a result of the appellants' illegal combination. Appellee's primary claim for damage was based on the diminution of the value of its business operation: the difference between the value of the business as a "going concern" and the liquidation value actually received by Hawaiian Oke shareholders.[5] (Exh. P-1 through P-5.) Appellee also sought to re-

[5]Appellee made no claim for future lost profits *qua* profits. Evidence of anticipated future profits along with a table of "price-earnings" multiples (Exh. P-5) were introduced to afford the jury a basis for determining the going concern value of Hawaiian Oke as of the date of appellants' conspiracy.

cover actual out-of-pocket losses occasioned by the appellants' illegality.

The evidence showed that between 1958 and 1961, Hawaiian Oke lost nearly $250,000 from its operations. (Tr. 233-234.) These losses were not in any way attributed to the acts of any defendant. In October 1961, Theodore (Ted) Wong was brought in to supervise the operation; Ted Wong had an extensive educational and business background. (Tr. 135-141.) Wong immediately set out to comprehensively rehabilitate the business, instituting programs of expense control and effectuating many profitable changes. (Tr. 141-145.) Wong reduced the amount of warehouse space and subleased a portion of the unneeded area. (Tr. 144.)

Subsequently, Hawaiian Oke was able to acquire the Calvert and Frankfort lines. (Tr. 145-146.) Hawaiian Oke's total operation went from a net loss of $50,179.54 in 1961 to net gains of $8,260.80 in 1962, $2,640.11 in 1963 and $2,497.85 in 1964. (Tr. 541-545.) Moreover, while the Hawaiian liquor market was generally poor in 1963 and 1964, all prospects for the future, with an anticipated increase in tourism, were bright. (Exh. P-75; Tr. 748-752; 2395.) This is confirmed by the significant increase in Hawaiian Oke's sales in the first three months of 1965 (as compared with the same period in 1964). (Tr. 1183-1184.) In addition, it was clear that in late 1965 Hawaiian Oke was to become the state-wide distributor of Calvert's new Leilani Hawaiian Rum (Tr. 1641) which was expected to be a highly popular and profitable line and one which was extremely attractive to McKesson. (Tr. 345-346.)

Hawaiian Oke's recent profitable trend and bright outlook for the future was relevant economic data indicating a business with a "going concern" value. Its performance as a distributor, since being rehabilitated in 1962, was most impressive. Its depletions of Calvert brands far exceeded the performance of earlier distributors (including McKesson). (Exh. P-106 through P-109.) Appellee also showed superiority over McKesson in the simultaneous distribution of Four Roses' Kessler line. (Exh. P-111.) Four Roses officials were so impressed that they had decided to terminate McKesson and permit Hawaiian Oke to distribute the Kessler brand exclusively. (Tr. 1302.) Moreover, Barton's Hawaii depletions were increased from 758 cases in 1961 to 5,401 cases in 1964—an increase of 700%—and the outlook for 1965 was even greater. (Exh. P-113.)

Thus Hawaiian Oke was an organization on the move with whose performance suppliers were increasingly satisfied—and they so stated. (Exh. McK-39; Tr. 793; 1260; 2580.) Many individuals, some with extensive liquor industry experience expressed the desire to purchase the Hawaiian Oke. (Exh. P-71; Tr. 688, 1645-46, 1816.) One prospective purchaser, Emilio Gonzales, not only related his interest in acquiring Hawaiian Oke but mentioned the figure of $360,000 in this connection. (Tr. 1645-46.)

Appellee also presented a certified public accountant who analyzed the financial history of appellee—its sales trend and expense control ability—and made certain computations about Hawaiian Oke's prospects. These projections were made on the basis of appellee's books, records, tax returns and financial statements. The studies demon-

strated a bright future—the growth potential of appellee as an important component in determining the value of the business as a going concern. The jury was shown projections of sales and profits which appellee would be expected to enjoy. (Exh. P-1; P-2; P-3.) It was demonstrated that had Hawaiian Oke's business pattern not been interrupted by a loss of four of its major suppliers, it could have realized a profit at year's end of $45,256. (Exh. P-2; Tr. 1105.) Moreover, profits could be expected to increase each year thereafter. (Tr. 1105-1118.)

In addition to this matter of the appellee's "going concern" value, evidence was introduced relating to "out-of-pocket" losses suffered by Hawaiian Oke as a result of appellants' illegal combination. The evidence summarized above demonstrated that 1965 would have been a profitable year for Hawaiian Oke. Yet, it was shown that because of the combined boycott organized and effectuated by the appellants, Hawaiian Oke sustained an "out-of-pocket" loss of $35,000 in 1965 prior to and in connection with liquidation. (Exhs. P-1, P-2, P-5, P-6; Tr. 544.)

III

QUESTIONS PRESENTED

1. Was the evidence sufficient to support the verdict that appellants combined and conspired to terminate business dealings with appellee in violation of Section 1 of the Sherman Act?

2. Did the trial court commit prejudicial error in the admission and rejection of certain evidence on the issue of conspiracy?

(a) Was the Friedman statement relevant and admissible for the purpose of demonstrating his state of mind and rebutting Barton's alleged "independent business" reasons for terminating appellee?

(b) Was the evidence relating to McKesson's performance after the termination relevant in showing the comparative quality of appellee as a prior distributor of the same liquor products in Hawaii?

3. Did the trial court commit prejudicial error in its instructions regarding the issue of conspiracy?

(a) Did the court's instructions correctly state the applicable law?

(b) Did the instructions proposed by appellants so correctly characterize the facts and state the applicable law that they could and should have been given without qualification?

(c) Was the Court's instructions relating to the legal capacity of the unincorporated divisions of the House of Seagram, Inc. to conspire among themselves and the participation of Joseph E. Seagram & Sons, Inc. in directing such an illegal combination correct, or, in any event did that instruction become moot by virtue of the jury's finding that all of such Seagram entities combined and conspired with both Barton and McKesson?

4. Was there sufficient relevant economic data to support the jury's verdict that appellee had been damaged in the amount of $65,000?

5. Did the trial Court commit prejudicial error in giving and refusing instructions on the issue of damages?

(a) Did the Court's instructions correctly state the applicable law?

(b) Did the instructions proposed by appellants so correctly characterize the facts and state the applicable law that they could have been given without qualification?

IV

APPELLEE'S RESPONSES TO THE SPECIFICATIONS OF ERROR

The Appendix to this brief consists of a table which specifically refers to the portions of appellee's argument which are responsive to each of appellants' assignments of error.

V

SUMMARY OF ARGUMENT

In late June and early July of 1965, appellee received in rapid succession, notices from four of its major suppliers that it was being terminated as a distributor of these suppliers' liquor products in Hawaii. The evidence established that survival of appellee's business was just not feasible thereafter in view of the importance of the lines (both in terms of brand name and percentage of appellee's total business) and the lightning like speed with which the mass terminations occurred. The salient facts and the chronology of events clearly demonstrate

that this group boycott was the result of a plan for combined action promoted and organized by McKesson, one of appellee's competitors.

The *unique* decision to open the second house was made a short ten to fourteen days after the idea was conceived; and only after extensive meetings and discussions between McKesson officials and executive officers of the suppliers involved (Calvert, Four Roses, Frankfort and Barton).

There was evidence demonstrating that the plan to open a second house was aimed primarily at appellee. Of the various independent liquor distributors in Hawaii, only appellee's suppliers were pirated. Indeed, more than 87% of the 1966 liquor sales by Portside consisted of the products of appellee's former suppliers. The evidence further demonstrated that each supplier was aware of the fact that he was part of this combination and each agreed to keep the plan secret from Hawaiian Oke until the date of the terminating action.

On June 3, 1965 Calvert and Jos. E. Seagram officials met with McKesson representatives, and the idea of a second house was conceived. Calvert wanted to go with McKesson but refused to do so unless a separate house was formed. All parties concerned realized that the new house required additional lines. The other lines mentioned at that early date were: Four Roses, Frankfort and Barton—all of which were then distributed by Hawaiian Oke. On June 14 or 15 Maloney (McKesson) met with Friedman and Weinstock of Barton informed them that McKesson would open a second Hawaiian house *if* Barton would join with Calvert as the major suppliers of that house. (Exh. P-71) Barton agreed to join the

plan at that time (evidenced by the agreement to keep the entire matter a secret, and the "Dear Sheldon" letter); and *only then* did McKesson commit itself to open the second house. In the meantime, Cotler (McKesson), Murphy (Calvert), and Yogman (Jos. E. Seagram) had similar commitments from Four Roses and Frankfort to join Calvert and Barton in terminating Hawaiian Oke. The plan was not revealed, and McKesson did not commit itself to open the second house until *after* discussions with Calvert and Barton representatives. The evidence thus compels the conclusion that the appellant suppliers entered into the plan on a mutually conditional basis. Joint action was contemplated and essential to the success of the scheme. *Interstate Circuit, Inc. v. United States,* 306 U.S. 208, 226-227 (1939); *United States v. General Motors Corp.,* 384 U.S. 127 (1966); *Flintkote Co. v. Lysfjord,* 246 F.2d 368, 375 (9th Cir. 1957).

Each supplier alleged independent business reasons for the termination—but the evidence presented, showing appellants' anti-competitive purposes and demonstrating that appellee was an excellent distributor, justified the jury's rejection of appellants' contention.

The plan, as it was executed, then, constituted a classic example of a concerted refusal to deal which is violative *per se* of Section 1 of the Sherman Act. *United States v. General Motors Corp.,* 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 127 (1959).

The objections raised by appellants regarding the trial Court's rulings and instructions that the three unincorporated divisions of the House of Seagram, Inc. (Calvert, Four Roses and Frankfort), were legally capable of con-

spiring are nothing more than mere ''smokescreens''. These objections have been rendered moot by the jury's determination that the House of Seagram, Inc. and Joseph E. Seagram & Sons combined and conspired with Barton and McKesson.

Nor did the court commit prejudicial error in admitting certain items of evidence (the Friedman statement and evidence of Portside's 1966 performance) demonstrating state of mind and otherwise contradicting the alleged ''independent business'' reasons proffered by appellants as the grounds for terminating appellee's distributorship.

Finally, the evidence was sufficient and provided ample relevant economic data to support the jury's determination that appellee sustained injury to the extent of $65,000 (before trebling). *Story Parchment Co. v. Patterson Parchment Paper Co.,* 282 U.S. 555 (1931); *Bigelow v. R.K.O. Radio Pictures, Inc.,* 327 U.S. 251 (1946). The relevant economic data showing the diminution in the value of appellee's business as a ''going concern'' was properly established by testimony and charts presented by experts and others relating to prospective sales, expenses and profits. Moreover, the expressions of interest by prospective purchasers and their recognition of the ''going concern'' value of a business such as appellee's were all relevant. So, also, the evidence relating to appellee's out-of-pocket losses was proper and sufficient.

The instructions given by the trial court on the issues of conspiracy and damages correctly stated the applicable law. On the other hand, the instructions proposed by appellants and refused by the court either merely restated those given or so improperly characterized the facts and

applicable law as to be incapable of being given without qualification. Thus, no prejudicial error was committed in the giving or refusing of instructions by the trial court.

It was for the jury to assess and analyze the totality of the evidence of the conspiracy and the resulting injury to the appellee. This Court should not reweigh and reanalyze the factual questions best left in the hands of the jury. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *Washington State Bowling Prop. Assn. v. Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir. 1966). The judgment should be affirmed.

VI

ARGUMENT

A. THE EVIDENCE PRESENTED AT TRIAL WAS CLEARLY SUFFICIENT TO JUSTIFY THE JURY'S DETERMINATION THAT APPELLANTS ACTED IN CONCERT IN VIOLATION OF SECTION 1 OF THE SHERMAN ACT IN THEIR TERMINATION AND REFUSAL TO DEAL FURTHER WITH APPELLEE, HAWAIIAN OKE

(Response to Appellants' Assignment of Error, No. 1)

1. The Trial Court's Refusal to Grant Appellants' Motions for Directed Verdict, Judgment N.O.V. and a New Trial Was Proper.

(a) The Applicable Legal Standard Requires This Court to Respect the Factual Determinations of the Jury.

Appellants ask this Court to sit as a jury: to reanalyze the voluminous record (the trial transcript alone is in excess of 3000 pages); to reweigh the credibility of the witnesses and the relative importance of the testimony presented at the trial of this lawsuit. Unless appellants can demonstrate that the jury's finding of a conspiracy

was "clearly erroneous" *Columbia Pictures Corp. v. Chas. Rubenstein, Inc.,* 289 F.2d 418 (8th Cir. 1961); *Besser Mfg. Co. v. United States,* 343 U.S. 444, 446-7 (1952), that factual determination cannot be set aside merely because a contrary conclusion could have been reached. *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967).

Appellants suggest that the trial court erred in refusing to direct a verdict in their favor at the close of plaintiff's evidence; and that it compounded its error in refusing to enter judgment *non obstante verdicto* or to order a new trial after the jury returned in plaintiff-appellee's favor. Appellants now ask this Court to do what the trial judge properly refused to do—to substitute its factual judgment for that of the jury.

The cases and precedents are unequivocal in supporting the trial court in its refusal to direct a verdict. *Wilkerson v. McCarthy,* 336 U.S. 53 (1949); *Case-Swayne Co. v. Sunkist Growers, Inc.,* 369 F.2d 449 (9th Cir. 1966). As this Court stated in *Case-Swayne* (369 F.2d at 452):

> "In ruling on a motion for a directed verdict, the trial court is required to view the evidence in the light most favorable to the party against whom the motion is made. 'On appeal, likewise, the appellate court must consider the evidence in its strongest light in favor of the party against whom the motion was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify'. [citing 5 Moore's Federal Practice 2316 (1951)] This is true 'even though contrary inferences might reasonably be drawn'" [citing *Continental Ore Co. v. Union Carbide,* 370 U.S. 690, 696 (1962)]

To the same effect are: *Lucero v. Donovan,* 354 F.2d 16, 21 (9th Cir. 1965) and *Schnee v. Southern Pac. Ry.,* 186 F.2d 745, 746 (9th Cir. 1951).

In *Schnee* this Court advised that in ruling on a defendant's motion for directed verdict, the trial court must look only to the evidence and reasonable inferences therefrom which support the plaintiff's case. Moreover, in such circumstances, the trial court must assume and accept the plaintiff's evidence and its reasonable implications as true. (To the same effect: *Girardi v. Gates Rubber Co.,* 325 F.2d 196 (9th Cir. 1963); *United States v. Blair,* 193 F. 2d 557 (10th Cir. 1952).)

These same principles restrict the trial court's authority to grant judgment *n.o.v. Safeway, Inc. v. Preston,* 269 F.2d 781 (D.C. Cir. 1959); *Hansen v. Firestone Co.,* 276 F.2d 254 (6th Cir. 1960), or to order a new trial. 39 Am. Jur., New Trial §131, p. 141 (1942 ed.).

(b) The Existence of a Combination or Conspiracy by the Appellants Herein May Be Proven by Evidence of the Circumstances Surrounding Their Activities, Viewed As a Whole.

Appellants, in their Brief, attempt to compartmentalize specific items of evidence as to the inferences which they support. Such a position is clearly unjustified. Numerous decisions have made it clear that the jury must be permitted leeway in viewing the "whole picture". *Lessig v. Tidewater Oil Co.,* 327 F.2d 459, 466 (9th Cir. 1964). In *Lessig,* this Court admonished that the trier of fact must be given "the full benefit of all evidence without tightly compartmentalizing various factual components" of the alleged conspiracy. 327 F.2d at p. 466. See also: *Sanitary*

Milk Prod. v. Bergjans, 368 F.2d 679, 691 (8th Cir. 1966). In so ruling, this Court was following the clear and express mandate of the United States Supreme Court regarding the important constitutionally defined role of the jury in appraising and assessing the evidence of the existence of a conspiracy. *Continental Ore Co. v. Union Carbide & Carbon Corp., supra.*

Moreover, appellants, in their Brief, point to "Conflicts in the Evidence" (page 21, *et seq.*), as if to imply that their presentation of evidence negates the jury's finding of a conspiracy. Such a position shows little regard for this Court's long standing position of deferring to the factual determinations of the jury. As Judge Hamley stated in *Standard Oil Co. v. Moore,* 251 F.2d 188, 198 (9th Cir. 1957), in determining the sufficiency of evidence of a jury's finding of conspiracy ". . . all reasonable inferences, favorable to the verdict, are to be drawn". Moreover, all conflicts in evidence must be resolved in favor of the verdict; it must be assumed that the jury, as it has the right to do, disbelieved those portions of the defendants' evidence which are inconsistent with the verdict. (251 F.2d at p. 198.) It is clear, then, that this Court should view the evidence favorable to the appellee's case as a whole and not search the record for evidence which contradicts the jury's verdict. *Standard Oil Co. v. Moore, supra,* at p. 210.

It has been recognized that the difficulty of proving a conspiracy is greater in cases, such as ours, where there are only a few conspirators. Rahl, Conspiracy and the Antitrust Laws, 44 Ill. L. Rev. 743, 757 (1950). This Court has not compelled a showing of direct evidence to

prove conspiracies. *Flintkote Co. v. Lysfjord,* 246 F.2d 368 (9th Cir. 1957); *Esco Corp. v. United States,* 340 F.2d 1000 (9th Cir. 1965). It is well recognized that in the modern world of sophisticated business practices, corporate officers do not keep written records of their anti-competitive agreements and activities. As the Third Circuit Court of Appeals observed:

> ". . . In this modern era of increasing subtleties, it is rare indeed for a conspiracy to be proved by direct evidence. There is no dispute over the proposition that circumstantial evidence will sustain a finding of conspiracy". *Milgram v. Loew's, Inc.,* 192 F. 2d 579, 583 (3rd Cir. 1951), cert. denied 343 U.S. 929 (1952).

In the final analysis, the jury must decide whether, considering all of the relevant circumstances, the defendants have acted independently or in concert. *Loew's, Inc. v. Cinema Amusements,* 210 F.2d 86 (10th Cir. 1954). As was stated in the *Loew's* case:

> ". . . it is not necessary in a case of this kind that there be direct evidence of a conspiracy. . . . More often than otherwise, direct evidence of such a conspiracy is not available. But it may be proved by a development and collation of the circumstances. It may be inferred from the things said and done". 210 F.2d at p. 93, citing *Eastern States' Retail Lumber Dealers' Ass'n v. United States,* 234 U.S. 600 (1914).

With these considerations in mind, then, we shall review the evidence presented by appellee in the trial below. This evidence, viewed in its most favorable light and necessarily accepted as true, will indicate the propriety of the trial court's refusal to grant a directed verdict, a

judgment *n.o.v.*, or a new trial. Moreover, the evidence so viewed will demonstrate that this Court must likewise refrain from disturbing the jury's determination that appellants conspired, combined and acted in concert in terminating and refusing to deal further with appellee, Hawaiian Oke. *Case-Swayne Co. v. Sunkist Growers, supra;* 5 Moore's Federal Practice 2316 (and cases there cited).

2. The Evidence Presented, and the Reasonable Inferences, Which Were Drawn Therefrom, Support the Jury's Finding of a Concerted Refusal to Deal With Appellee by the Appellant Suppliers, Organized by and Effectuated Through Appellant McKesson & Robbins, One of Appellee's Competitors.

Appellants seek to equate this case with a situation where *a* supplier has decided to change *its* distributor. They have cited such cases as *Ace Beer Distributors v. Kohn, Inc.*, 318 F.2d 283 (6th Cir. 1964) and *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F.Supp. 899 (D. Md. 1956) as authority for the proposition that a manufacturer may validly terminate one distributor in favor of another.

It is not necessary here to quarrel with the principle of these cases. They just do not apply to this case. Both *Ace Beer* and *Schwing* concerned a termination by *one supplier, acting alone.* However, in the present case, the jury found a combination—a horizontal agreement—between various suppliers, acting together, at the instance of appellee's competitor, to terminate and refuse further dealings with appellee Hawaiian Oke. This concerted action resulted, foreseeably, in the destruction of appellee. The concerted switch of distributors also increased the

market power and business volume of appellee's competitor—McKesson—who played such an instrumental role in organizing the group boycott among suppliers. This case must be reviewed in accordance with the standards established in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 127 (1959) and *United States v. General Motors Corp.*, 384 U.S. 127 (1966).

Viewing the chronology of events wholly and giving to appellee the benefit of all reasonable inferences, it is perfectly clear that the jury could have found a combination among the appellants to terminate plaintiff and assist in the establishment of a new distributor, Portside.

Granting that Calvert originally approached McKesson to consider the possibility of a change of distributors in Hawaii, the undisputed fact that Calvert imposed, as a condition precedent to any such move, the establishment of a second house by McKesson is the critical fact from which the concerted action sprang. McKesson and Calvert alike recognized that a second house could not succeed with Calvert alone. The new house required a rounded line of various types of liquor at different price levels in order to adequately service retailers' needs. Thus, the key to the Calvert switch to McKesson—on its condition imposed basis—was the securing of such lines for the new house. At this point, the concert of action among suppliers and McKesson became indispensable to the accomplishment of the common goal—the establishment of a viable new distributorship accomplished by elimination of appellee. What better prey than Hawaiian Oke which would already be injured by the loss of Calvert—a key line? McKesson, then, with the assistance of Seagram

officers, seized the opportunity to steal the most important of appellee's business and eliminate it as a competitor.

Thus, on the very same day as the first serious Calvert-McKesson meeting to consider the switch, McKesson proposed that the second house could be stocked with a series of lines which were either already in the McKesson house or belonged to appellee. With at least four other viable wholesalers in Hawaii having important lines, it is strange that McKesson never considered and actually made no effort to take lines from any of them. Certainly this critical fact should be accorded weight in determining whether McKesson organized and promoted a group boycott of Hawaiian Oke to eliminate it as a competitor.

That Yogman of Jos. E. Seagram & Sons, Inc., was present at the June 3 meeting to assist in the shift of other House of Seagram divisions (Four Roses and Frankfort) to McKesson is fairly inferable from all of the facts, considering particularly that Four Roses, acting on its own, had offered to renew appellee's distributorship and that McKesson never had any direct contact at all with Frankfort. More important, Maloney of McKesson recited in a letter to his superior that Seagram, through Yogman and its President, Edgar Bronfman, actually asked McKesson to get into this "deal". Plainly, then, Yogman (and/or Bronfman) acted as liaison between McKesson and the divisions of the House of Seagram in arranging a concerted and simultaneous termination of plaintiff and shift to McKesson in order that the new house might open up with a complete line of products.

That all of these facts were communicated to Barton is plain. Friedman and Weinstock were told by Maloney

of the imminent switch by the House of Seagram lines (or at least two of them) to McKesson. Indeed, they were asked—in typical conspiratorial style—to keep this information secret from appellee. And only after this meeting in which the imminent switch of the House of Seagram lines was revealed and agreed to be kept in confidence did McKesson actually advise Calvert that it had decided to go forward with its new house—presumably on the assurance of Barton that it would join the plan to terminate plaintiff and open Portside.

All of Barton's assertions to the contrary can be disbelieved—particularly in light of McKesson's several memoranda indicating Barton's presence in their new house and, more importantly, Kauhane's "Dear Sheldon" letter to Friedman (whom he had never met) inquiring when Barton proposed to advise Hawaiian Oke of its loss of the Barton line. This letter preceded by more than a week the date on which Friedman visited with appellee in Hawaii and allegedly decided to make the move. Further, in the light of Friedman's state of mind "European deal" admission, the jury could easily have disregarded all of the Barton "afterthought" reasons for terminating appellee.

The abnormal business behavior in this case should not be overlooked. Do sophisticated liquor manufacturers move into a distributorship before it has a sales manager, a sales staff or is otherwise even capable of functioning? Why did McKesson elect to open a second house in Hawaii—the only place it has ever done so? Why did a supplier, Four Roses, which had recently tendered a renewal contract to its distributor suddenly switch to a

yet unopened house? What prompted an executive vice-president of a distiller (Jos. E. Seagram) to sit in on a routine meeting involving one of the marketing divisions of a subsidiary company and a distributor particularly when that officer is (a) not an officer of the subsidiary having marketing responsibility and (b) not himself responsible for marketing activities? Why did a McKesson vice-president say that "pressure" should be applied to the president of giant Seagram concerning some "deal" the latter had devised?

These unusual circumstances, viewed cumulatively and in conjunction with the sequence of events, demonstrates that there was a concerted effort here to open Portside by terminating Hawaiian Oke's key lines. It is totally presumptuous to suggest that on the basis of the record here—considering the state of the law as to which the jury was properly instructed—that the jury could not have found concerted action in violation of Section 1 of the Sherman Act. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).

In the *Paramount Pictures* case, the Supreme Court stated:

> "It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a *concert of action is contemplated* and that the *defendants conform to the arrangement.*" 334 U.S. at p. 142 (citing *Interstate Circuit, Inc. v. United States, supra,* and *United States v. Masonite Corp.*, 316 U.S. 265 (1942)) (Emphasis added.)

In the *United States Gypsum* case the Court observed that a finding of conspiracy is especially proper where the declarations of the parties support the fact that each had knowledge of the parallel activities. In our case, the evidence clearly demonstrated that Calvert and other Seagram executives were well aware of the need for combined action by suppliers to form a new McKesson house. Calvert and other Seagram executives knew and freely discussed the need for additional lines; they were made aware of McKesson's interest in having Barton join into the plan (Exh. P-71). Barton executives were well aware of Calvert's (and most probably other Seagram Division's) plan to terminate Hawaiian Oke.

Thus, the Supreme Court in *United States Gypsum* may have been referring to the very situation present in our case when it stated:

> "Those two cases [*Interstate Circuit, Inc. v. United States, supra,* and *United States v. Masonite Corp., supra*] establish that when a group of competitors enters into a series of separate but similar agreements with competitors or others, a strong inference arises that such agreements are the result of concerted action. That inference is strengthened when contemporaneous declarations indicate that supposedly separate actions are part of a common plan." 333 U.S. at p. 394.

The appellants have argued, citing this Court's opinion in *Independent Iron Works, Inc. v. United States Steel,* 322 F.2d 656 (9th Cir. 1963), that similar behavior by competitors—even with knowledge—does not alone support a conspiracy. (Opening Brief of Appellants, pages

23-24.) The *Independent Iron Works* case is clearly distinguishable from our own. In our case there was a great deal more than mere parallel behavior among appellants. The jury could have reasonably found that the activity of each appellant was conditionally dependent upon similar behavior by each of the suppliers in terminating Hawaiian Oke. *Interstate Circuit, Inc. v. United States, supra.* In the *Independent Iron Works* case, this Court indicated another basis for distinguishing the present case when it stated:

> ". . . the inference of a conspiracy among the defendants might have been permissible if [there was] proof that defendants' policies of distribution were aimed at plaintiff alone. . . ." 322 F.2d at p. 664.

This latter statement more properly describes our case. It was clear from the beginning of the plan herein involved that McKesson's efforts to induce joint action "were aimed at" Hawaiian Oke. At the June 3, 1965 meeting with Seagram executives, the Calvert and Four Roses lines were mentioned. (Tr. 2667-8.) Both of these were suppliers of Hawaiian Oke. At the McKesson meeting later that same day, Barton, Frankfort, Calvert and Four Roses were the lines mentioned for the new house. (Tr. 342-49.) All four of these were then suppliers of Hawaiian Oke. In the June 7, 1965 memo, Kauhane's listing of possible new lines for the second house again "aimed at" Hawaiian Oke (Exh. P-71), as did McKesson's interest in distributing Barton products in Hawaii. (Tr. 1516-17; Exh. P-74.)

This Court's opinion in *Independent Iron Works,* then, is not dispositive of this case. Nor is the Supreme Court's

decision in *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954), frequently cited in appellants' Brief, relevant to our case. In *Theatre Enterprises,* the Court merely affirmed a jury determination that no conspiracy was present. In our case the jury found that a conspiracy was formed by appellants. More in point, for our case, then, is the following statement by Judge Barnes in *Flintkote Co. v. Lysfjord,* 246 F.2d 368, 375 (9th Cir. 1957):

> "But there was evidence from which an inference might have been drawn by the trier of fact warranting the belief that defendant . . . supplier . . ., *could have acquired knowledge of the conspiracy;* and there was evidence which warranted the conclusion that [defendant] with inferred knowledge *participated in the conspiracy, and aided it, by its refusal to sell to plaintiffs.*" (Emphasis added.)[6]

In the creation of McKesson's second house, concerted action was invited, anticipated, and realized. McKesson's "invitation" to the distiller-appellants required, for the successful operation of that house, the mutual and simultaneous participation of various suppliers. The fact that the entire plan was "aimed at" and anticipated a combined termination of appellee—with each distiller-appel-

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[6]In *Milgram v. Loew's Inc.*, 192 F.2d 579, 583 (3rd Cir. 1951) the Court ruled that parallel refusal to deal coupled with the fact that each defendant ". . . acted with knowledge of the [similar] policies of his competitors . . ." was sufficient to establish an illegal conspiracy.

In *Wm. Goldman Theatres v. Loew's, Inc.*, 150 F.2d 738, 745 (3rd Cir. 1945) the Court stated:

> "Uniform participation by competitors in a particular system of doing business, where each is aware of the others' activities, the effect of which is a restraint of interstate commerce, is sufficient to establish conspiracy . . ."

lant having knowledge of the terminating action of the others and the effect of such a combination upon Hawaiian Oke—clearly constitutes a conspiracy in violation of Section 1 of the Sherman Act. *Interstate Circuit, Inc. v. United States,* 306 U.S. 208, 226-227 (1939); *United States v. General Motors Corp.,* 384 U.S. 127 (1966).

Moreover, the jury could reasonably have concluded that the various terminations of Hawaiian Oke were not the product of independent business judgment. Appellants have cited *Delaware Valley Marine Supply Co. v. American Tobacco Co.,* 297 F.2d 199 (3d Cir. 1961), for the proposition that similar refusals by three suppliers to deal with a new company was not sufficient to establish a conspiracy. (Opening Brief, pages 22, 23.)

Our case is not comparable to the *Delaware Valley* case as appellants have suggested. There, the plaintiff was a new company, soliciting various suppliers. The fact that several suppliers refused to do business with the new company was not of significant probative weight in establishing that the suppliers acted in concert. In our case, however, there was a prior history of dealing between appellant suppliers and appellee Hawaiian Oke. We have here an instance where four regular suppliers combined to simultaneously terminate their business dealings with a distributor which had served each of them well for several years. The evidence showed that Hawaiian Oke was doing more business in Hawaii for each of the involved suppliers than any previous distributor (including McKesson) had ever done for them before. The evidence showed that each such supplier had expressed satisfaction with Hawaiian Oke's performance. Under these circum-

stances, the joint termination of Hawaiian Oke and switch to the newly "unformed" Portside was wholly inconsistent with good business judgment. In such cases the finder of fact is justified in regarding appellants' testimony of independent action and ignorance of the acts of others as "incredible". *Milgram v. Loew's, Inc., supra,* 192 F.2d at p. 585.

Thus in the present case, where several suppliers acted similarly and simultaneously, and in a manner that was contrary to their apparent economic self-interest, the inference that they acted pursuant to an agreement becomes even stronger. *Bordonaro Bros. Theatres, Inc. v. Paramount Pictures Inc.,* 176 F.2d 594 (2d Cir. 1949). Unlike the suppliers in the *Delaware Valley* case, the appellants here could say "yes", "no", or "I will terminate if the others do likewise." Because the jury found that the appellants followed the latter alternative, the verdict must be affirmed.

This Court has long recognized that the issue of whether appellants' refusal to deal with appellee was the result of illegal concert of action or individual business decisions

> ". . . must be judged by the trier of facts, to determine if it was an innocent and lawful exercise of the seller's private right, or an act which showed knowing participation in an unlawful conspiracy." *Flintkote Co. v. Lysfjord,* 246 F.2d at p. 376 (9th Cir. 1957).

In our case the jury has already determined that the joint termination of Hawaiian Oke "showed a knowing participation in an unlawful conspiracy" by the appel-

lants. This determination by the jury must not be disturbed on appeal. A recent statement by the Supreme Court is clearly applicable to the present case:

> ". . . it has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy —certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan." *United States v. General Motors Corp.,* 384 U.S. at pages 142-143 (citing *United States v. Parke, Davis & Co.,* 362 U.S. 29; *United States v. Bausch & Lomb Optical Co.,* 321 U.S. 707; *F.T.C. v. Beechnut Packing Co.,* 257 U.S. 441).

3. The Appellants' Combined and Concerted Activity in Terminating and Refusing to Deal With the Appellee, Constituted a Group Boycott Which Is Violative Per Se of Section 1 of the Sherman Act.

Section 1 of the Sherman Act provides, in part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." (15 U.S.C. §1.)

In the Argument above, appellee has already demonstrated that its evidence sufficiently justified the jury's determination that the appellants combined in a plan resulting in the concerted refusal by several suppliers to deal with Hawaiian Oke.

Because they restrict free and open competition in the marketplace, concerted refusals to deal are unlawful *per se* even if they are pursued with good intentions or for lawful reasons. *Fashion Originators' Guild v. F.T.C., infra; United States v. Trenton Potteries Co.,* 273 U.S. 392 (1927); *Klor's, Inc. v. Broadway-Hale, supra; Ford*

Motor Co. v. Webster's Auto Sales, 361 F.2d 874 (1st Cir. 1966).

In *Klor's,* Mr. Justice Black (speaking for eight members of the Supreme Court) stated:

> "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category . . .
>
> "Plainly the allegations of this complaint disclose such a boycott. This is not a case of a single trader refusing to deal with another." (Citing *United States v. Colgate,* 359 U.S. at 212.)

The evil inherent in a concerted refusal to deal is that the competitive freedom of the parties is unreasonably restricted. In our case, appellee was unaware of the forces in motion against it until the boycott was a *fait accompli.* In the words of the *Klor's* case, the boycott took from Hawaiian Oke the freedom to deal "in an open competitive market and drives it out of business as a dealer in the defendants' products. It deprives the . . . [suppliers] of their freedom to sell . . ." (359 U.S. at 213.) As such, the group boycott imposes a harmful and artificial burden on competition. It is a device laden with anti-competitive overtones. *United States v. General Motors Corp. supra.*

In their Brief (at page 34) appellants argue that in the liquor industry "such an arrangement may, in fact, be the only practicable means available for a small company to enter the market". As such, appellants seem to be seeking an exemption from antitrust laws for the liquor industry. This same type of argument was made by the defendants in *United States v. General Motors Corp.,* 384

U.S. 127 (1966) and was rejected by the Supreme Court. In that case, the court made a statement about the objectionable activity there that must also apply to the present appellants' concerted termination of Hawaiian Oke:

> "It is of no consequence for purposes of determining whether there has been a combination or conspiracy under § 1 of the Sherman Act that each party acted in its own lawful interest. Nor is it of consequence for this purpose whether the 'location clause' and the franchise system are lawful or economically desirable." (384 U.S. at p. 142.)

Appellants further argue that a concerted refusal to deal with Hawaiian Oke is not *per se* unlawful unless undertaken with the purpose of furthering some additional anti-competitive purpose such as discriminatory treatment, price fixing, etc. (Opening Brief, pp. 27-36.)

Such a position is clearly at odds with the view adopted by the Supreme Court: *Eastern States' Lumber Assn. v. United States,* 234 U.S. 600 (1914); *Fashion Originators' Guild v. F.T.C.,* 312 U.S. 457 (1941); *Associated Press v. United States,* 326 U.S. 1 (1945); *United States v. Columbia Steel Corp.,* 334 U.S. 495, 522-23 (1948); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211 (1951); *Klor's Inc. v. Broadway Hale Stores, Inc.,* 359 U.S. 207 (1959); *Continental Ore Co. v. Union Carbide, supra; United States v. General Motors Corp., supra.* As the Supreme Court observed in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, supra:*

> "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby

> restrain their ability to sell in accordance with their own judgment."

Appellants herein have also urged that they were justified in refusing to deal with Hawaiian Oke because of alleged concern over extended credit and delay in meeting financial obligations. Even if appellants' allegations are accepted here (though the weight of the evidence would militate against such a conclusion), such are of no avail. Good motives and business judgment may justify *independent* decisions to cancel a distributor, but cannot justify the *concerted* refusal to deal which the jury found to have occurred in the present case. *United States v. General Motors, supra.* This, then distinguishes our case from *Ace Beer Distr. v. Kohn, Inc.*, 318 F.2d 283 (6th Cir. 1964), cert. denied, 375 U.S. 922; and *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F.Supp. 899 (D.Md., 1956) cited by appellants.

As the court stated in *General Motors:*

> ". . . where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, *we need not inquire into the economic motivation underlying their conduct . . . Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free market principles* embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' [interests]. (384 U.S. at p. 146; emphasis added.)

Appellants cannot successfully contend that their "arrangement" was justified merely because there was no combination between competitors of the appellee. It is

true that only one of the appellants, McKesson, was a distributor in direct competition with Hawaiian Oke. All of the other appellants are suppliers. Nevertheless, this represents the "classic" group boycott arrangement; it is identical in structure to that condemned by the Supreme Court in the *Klor's* case. There, as here, a competitor of the plaintiff persuaded a number of the plaintiff's suppliers to refuse to deal with the plaintiff. In our case, McKesson persuaded Barton, Calvert, Frankfort and Four Roses to act in concert and terminate all future dealings with Hawaiian Oke. Such an arrangement was condemned in *Klor's* and it must also be condemned here. *Darnell v. Markwood*, 220 F.2d 374 (D.C. Cir. 1955). Appellants' arguments to the effect that other sources of liquor supply were available cannot constitute a defense or justification for their conspiracy. In concerted refusal to deal cases, there is no duty for the victim of the illegality to exhaust other possible sources of supply. *Continental Ore Co. v. Union Carbide, supra.*

Nor can the appellants argue that Hawaiian Oke's business was so trivial and inconsequential that its elimination has no effect upon competition. *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962). That same argument was urged and rejected in *Klor's*. The Supreme Court observed (in regard to a concerted refusal to deal with one small businessman):

> "It [a group boycott] interferes with the natural flow of interstate commerce. It clearly has, by its 'nature' and 'character,' a 'monopolistic tendency.' *As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the*

> *economy.* Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations 'which tend to create a monopoly' whether 'the tendency is a creeping one' or 'one that proceeds at full gallop'." (359 U.S. at 213-14, citing *International Salt Co. v. United States,* 332 U.S. 392, 396 (1947); emphasis added.)

It cannot then be successfully denied that the concerted action of the appellants is of the type prohibited, *per se,* under the Sherman Act. *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.,* 364 U.S. 656, 660 (1961). As the Supreme Court recently stated:

> "Nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely." *(United States v. General Motors,* 384 U.S. at 148.)

B. THE TRIAL COURT DID NOT ERR IN GIVING AND REFUSING VARIOUS INSTRUCTIONS ON THE ISSUE OF APPELLANTS' LIABILITY IN COMBINING TO TERMINATE THE APPELLEE

1. The Trial Court Correctly Instructed the Jury That Concerted Termination of Appellee by the Appellants Was a Per Se Violation of the Sherman Act.

(Response to Appellants' Assignment of Error, No. 5)

The appellants have assigned as error (Assignment of Error No. 5, Appendix p. ix) that portion of the court's instruction to the jury as to the illegality *per se* of a con-

certed refusal to deal. (Tr. 3206-9.)[7] The jury was expressly instructed that each of the appellant suppliers "... may, acting alone, for any reason select the customers with whom it deals or refuses to deal." (Tr. 3206.) The jury was told that McKesson, as a competitor of Hawaiian Oke could properly solicit the business of Calvert, Four Roses, Frankfort and Barton. (Tr. 3207.) However, the instruction went on to state that if McKesson "... formed a combination or conspiracy with two or more of those sellers to terminate Hawaiian Oke . . ." then such would constitute a *per se* violation of the antitrust laws. (Tr. 3207-8.)

Thus, the jury was instructed that it could find against each of appellants only if it found, from the evidence, that they acted in concert and formed a combination to terminate the appellee. The jury was further instructed "... that the business reasons of . . . the parties may be considered . . . in determining whether there was, in fact, a combination or conspiracy between them, . . . or whether the parties in fact acted independently". (Tr. 3209.) The instruction, as given, represents the law applicable to the facts of this case. *Klor's, Inc. v. Broadway-Hale Stores, Inc., supra; United States v. General Motors Corp., supra.*

In *General Motors,* the Supreme Court made it unequivocally clear that if suppliers concert their action to deprive others (such as Hawaiian Oke in our case) of access to merchandise which the latter seek to sell to the public, the economic motivation of the suppliers is unim-

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[7]That portion of the instruction is fully set forth in appellants' opening brief, appendix pages ix-xii and need not be re-stated here.

portant. (384 U.S. at page 146.) It was the combination, the concert of action (which, in the present case, resulted in destruction of the business of Hawaiian Oke and its elimination from the market) which made the joint termination and refusal to deal with appellee a *per se* violation of the Sherman Act. *United States v. General Motors Corp.*, 384 U.S. at pages 145-146. In the present case, the trial court did *not* instruct the jury that the simultaneous termination constituted a group boycott. The court merely explained that a concerted refusal to deal is illegal *per se* under the Sherman Act and left to the jury the question of whether or not the appellants' activities fell within the definition. Thus the court's action was in conformity with this Court's recent decision in *Washington State Bowling Proprietors Assn., Inc. v. Pacific Lanes, Inc.*, 356 F.2d 371, 376 (9th Cir. 1966).

2. The Trial Court Correctly Instructed the Jury Regarding the Inferences to be Drawn from the Parallel Behavior of the Appellants.

(Response to Appellants' Assignment of Error No. 8)

The instruction given[8] by the trial court stated that "mere similarity of conduct among various persons, and the fact that they have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy". (Tr. 3202.) The court went on to instruct that while parallel behavior is admissible circumstantial evidence from which an agreement may be inferred "nevertheless proof of parallel business behavior

[8]That portion of the instruction involved is set forth in appellants' opening brief, appendix page xvii and need not be re-stated here.

does not of itself necessarily establish an agreement". (Tr. 3202.) The court further instructed the jury that the evidence need not show that appellants ". . . entered into any express or formal agreement . . ." (Tr. 3202.) But the court added:

> "What a preponderance of the evidence must show, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan." (Tr. 3203.)

Again, the above instructions, taken as a whole, constitute a correct statement of the law involved. *United States v. General Motors Corp., supra; Flintkote Co. v. Lysfjord, supra,* 246 F.2d at p. 376.

Appellants state (Opening Brief, p. 46) that the jury was "permitted to infer a conspiracy from parallel behavior alone". Such a contention is absurd upon a *complete* reading of the instruction given. Parallel business behavior, the jury was told, does *not* of itself establish proof of an agreement. The instructions given the jury permitted it to view the whole picture of what occurred in this case, drawing inferences from the development and collation of all the circumstances and from all of the things said and done. This is consistent with the legal standards applicable to antitrust cases. *Continental Ore Co. v. Union Carbide & Carbon Corp., supra; Esco Corp. v. United States, supra; Eastern States' Retail Lumber Dealers' Assn. v. United States, supra.*

Appellants also argue that the trial court erred in refusing to give Barton's Instruction No. 9 (R. 222), Sea-

gram's Instruction No. 5 (R. 231) and Seagram's Instruction No. 11 (R. 357).

Barton's Instruction No. 9 merely restates in a different style and with different emphasis, the trial court's instruction that parallel behavior does not necessarily prove a conspiracy. Barton's instruction also discounts the importance of the knowledge of each member of an alleged conspiracy of the similar activity of his co-conspirators. The trial court did not instruct the jury that mere knowledge by each appellant-supplier of anticipated similar conduct by one or more of the others was sufficient to establish a conspiracy. The trial court did instruct the jury, however, to consider whether these suppliers ". . . were knowingly members of the conspiracy alleged in the complaint." (Tr. 3203.) The jury was instructed that the law does ". . . prohibit independent businesses from becoming associated together in a common plan . . ." (Tr. 3207) or "acceptance . . . of an invitation to participate in a plan, knowing the necessary consequence of which, if carried out, restrains interstate commerce . . ." (Tr. 3212.)

Indeed, the following portion of the trial court's instruction seems to clarify the law on the subject and dispose of appellants' objection:

> "Before you may find that any defendant or entity here has become a member of a conspiracy, a preponderance of the evidence in the case must show that the conspiracy was knowingly formed and that the defendants, or in this case the entities, knowingly participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

> To act or participate knowingly means to act or participate voluntarily and intentionally, and not because of mistake, or accident, or other innocent reason. So, if any of the entities involved here, Joseph E. Seagram and Sons, Inc., The House of Seagram, Calvert, Four Roses and Frankfort, Barton, any of those, or McKesson, with understanding of the unlawful character of a plan, intentionally encourages, advises, or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a knowing participant—a conspirator.
>
> One who knowingly joins an existing conspiracy or combination is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy." (Tr. 3211-3212.)

The trial court's charge is in accord with the applicable law as stated by the Supreme Court: *Interstate Circuit, Inc. v. United States, supra; United States v. Masonite Corp., supra; United States v. U.S. Gypsum, supra;* and as stated by this Court, *Flintkote Co. v. Lysfjord, supra.* To reiterate the language of the *Flintkote* case:

> "But there was evidence . . . that defendant . . . *could have acquired knowledge of the conspiracy;* and there was evidence . . . that [defendant] with inferred knowledge participated in the conspiracy, and aided it, by . . . refusal to sell to plaintiffs." 246 F. 2d at p. 375 (emphasis added).

Seagram's Instructions Nos. 5 and 11 (R. 231 and 357) merely restate in different style and with different emphasis the trial court's charge that appellants, acting independently, had the right to select a new distributor and

the fact that each of them acted similarly does not, of itself, prove the existence of a conspiracy. Indeed, the refused instructions add nothing, in the way of relevant content, to the instruction given. (Tr. 3206-9.)

In *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), this Court underscored the importance of instructions which emphasize to the jury that conspiracies may be proven by circumstantial evidence. Indeed, this Court held that "the danger of confusion was increased by language repeatedly emphasizing the necessity for an agreement" as appellants here request. (327 F.2d at p. 472.) Hence, it is probable that appellants' proposed instructions unduly and prejudicially emphasize to the jury an alleged necessity for evidence of some kind of formal "agreement". The *Lessig* case makes it clear that emphasis should instead be placed, in these instructions, on the sufficiency of circumstantial evidence—such as unusual parallel business activity—as proof of the existence of an illegal combination.

Thus, the appellants' contention as to erroneous instructions must be rejected. "A party cannot claim error in the refusal to give a requested instruction which is not entirely correct, or which it is not possible to give without qualification, or which is so framed as to be capable of being misunderstood". *Cherry v. Stedman,* 259 F.2d 774, 777-8 (8th Cir. 1958); *Ursich v. La Rosa,* 328 F.2d 794, 797 (9th Cir. 1964).

Indeed, even if appellants' proposed instructions were absolutely correct, the trial court's refusal of them would not be error in this case. For, as was stated in *Employ-*

ers' Liability Assurance Corp. v. Maes, 235 F.2d 918, 922 (10th Cir. 1956):

> "There is no tenable basis for the contention that the failure to give [the requested instructions] constituted prejudicial error. It is sufficient to say that even though they may be correct statements of the law, the court is not required to give requested instructions if the material issues are covered by the instructions as a whole."

C. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN THE ADMISSION AND REJECTION OF CERTAIN EVIDENCE CONCERNING THE ISSUE OF CONSPIRACY

1. It Was Not Error to Admit the Statement by Friedman As to the Purpose of Seagram's and Barton's Change of Distributors.

(Response to Appellants' Assignment of Error No. 2)

At trial, Ted Wong testified that in a conversation with Sheldon Friedman (Barton) in the latter's Hawaiian Village Hotel room in early July of 1965, Friedman indicated that a possible reason behind the mass termination of Hawaiian Oke was ". . . a deal that McKesson would get Barton distribution in the West Coast . . . and in turn they would receive distribution here in Hawaii". (Tr. 167-8.) Further, Friedman was reported as having said ". . . maybe they [Seagram and McKesson] have a deal some place, maybe in Europe". (Tr. 168.) Appellants contend that the admission of this evidence was erroneous because it was hearsay, speculative and represented the only evidence of an ". . . improper motive for the change of distributors". (Opening Brief, pp. 36-8.)

The appellants' contentions are clearly without merit. The statement was not offered for the truth of what was said. It was *not* put in to prove that there were, in fact, various "deals" between McKesson and the appellant-suppliers, but rather, to show the state of mind of the declarant. The jury was expressly informed by the trial court of this limitation on the use of the statement. (Tr. 168.) At a subsequent point in the trial, Friedman denied having made the statement concerning possible "deals" to Wong. (Tr. 801.) The jury, of course, had the task of determining who was telling the truth in this matter and could have chosen to disbelieve Friedman's denial. *Standard Oil Co. v. Moore,* 251 F.2d 188, 198 (9th Cir. 1957). But inasmuch as the trial court specifically instructed the jury that such evidence could be considered only to show Friedman's state of mind—this Court cannot assume that the jury failed to discharge its duty by refusing to follow the judge's specific admonition. *Spencer v. Texas,* 385 U.S. 554, 565 (1967).

Friedman, in his testimony, urged that the reason behind his company's (Barton) termination of Hawaiian Oke was the latter's poor sales performance and tardiness in meeting debts. (Tr. 825-8.) However, Friedman's statements to Wong are inconsistent with the later contrived competitive reasons for the termination. When Friedman spoke to Wong at that early date, he could have related the alleged economic motivations for the termination. The fact that Friedman instead spoke of vague "deals" relevantly illuminates his state of mind at the time. The prior inconsistent statement, then, is most relevant for the jury's apprisal of Friedman's later inconsistent testimony

at trial concerning alleged competitive reasons for Barton's termination of Hawaiian Oke. In short, it goes to prove that the Barton "business reasons" are really defenses created as an afterthought to meet the exigencies of litigation. *State Farm Mutual Ins. Co. v. Porter,* 186 F.2d 834 (9th Cir. 1950).

The Supreme Court has recently approved of the admission of such statements to demonstrate the state of mind of a co-conspirator in an antitrust case by recognizing that ". . . the collaborator's state of mind is of significance here". *United States v. General Motors Corp., supra,* at p. 147 (footnote No. 22 of Court's opinion).

Thus, the admission of Friedman's statement since it was not offered for its truth, was not erroneous. Even more astounding, however, is appellants' contention that the statement was prejudicial because it provided the only suggestion of an improper motive for termination. In light of the many facts in this case pointing to an anti-competitive combination by the appellants, this contention is untenable. Friedman's statement was trivial and "harmless" (if erroneous at all) in relation to the whole picture which was presented to the jury.

2. It Was Not Error to Admit Evidence of Portside's Performance After the Change in Distributors. (Response to Appellants' Assignment of Error No. 3)

Appellants argue that evidence comparing Hawaiian Oke's performance before termination with Portside's subsequent performance was inadmissible because "there was nothing to suggest that in June and July of 1965

[appellants] had the slightest reason to suspect that Portside would not do a good job''. (Opening Brief, pp. 39.)[9]

The post-termination, comparative performance of Portside was introduced not to show that appellants should have known that Portside would perform poorly, but rather to demonstrate that Hawaiian Oke was performing relatively well in regard to sales of the distiller-appellants' products in the Hawaii market. It was designed to rebut the appellants' contention that appellee was terminated because of its alleged ''poor performance''. Certainly if Portside's 1966 sales would have shown increases over Hawaiian Oke's—this would have been relevant to confirm appellants' contentions that Hawaiian Oke was not an effective distributor. Therefore, inasmuch as Portside's performance was clearly inferior to that of appellee, the evidence was admissible to help support a contrary inference—that Hawaiian Oke was in fact an effective distributor of the products involved. This is consistent with the:

> ''. . . established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends rea-

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[9]This assertion, though irrelevant, is not true. There was a great deal of evidence (as outlined in more detail in the Argument above) showing that at the time of the switch in distributors, Portside was still on paper—unhoused, unstaffed and inoperable. Thus, the jury could well have rejected the "legitimate business" reasons proffered by appellants to justify the termination of Hawaiian Oke.

sonably to show the purpose and character of the particular transactions under scrutiny."

United Mine Workers of America v. Pennington, 381 U.S. 657, 670 (footnote 3 of Court's Opinion) (1965), citing

Standard Oil Co. v. United States, 221 U.S. 146-47 (1911);

FTC v. Cement Institute, 333 U.S. 683 (1948).

See also:

Continental Ore Co. v. Union Carbide & Carbon Corp., supra, 370 U.S. at 709-710;

Armco Steel Corp v. No. Dakota, 376 F.2d 206 (8th Cir. 1967);

Ohio Valley Electric v. General Electric Co., 244 F.Supp. 914 (S.D. N.Y. 1965).

3. The Trial Court Did Not Err in Excluding from Evidence a 1966 Letter (Ex. B-67) Regarding Barton's Replacement of Portside As Its Distributor. (Response to Appellants' Assignment of Error No. 4)

Exhibit B-67 was a May 25, 1966 letter from Spengler & Sons, another distributor of liquor products in Hawaii, in response to an inquiry by Barton regarding the possibility of switching to Spengler from Portside. (Tr. 863-67.) At trial, one of appellants offered this letter to rebut the inference of conspiracy. Clearly, such a post-conspiracy declaration by a party defendant is self-serving hearsay. *Richardson v. Walsh Constr. Co.,* 334 F.2d 334 (3rd Cir. 1964); *Mandel v. Pennsylvania R. Co.,* 291 F.2d 433 (2nd Cir. 1961) *cert. denied* 368 U.S. 938. Hence the Spengler letter was properly excluded.

More important, however, other evidence concerning Barton's purported dissatisfaction with Portside and its discussions with Spengler was admitted and these matters were aired before the jury. (Tr. 854-62.) Thus, the letter itself was cumulative (Tr. 867); and it was therefore solely within the discretion of the trial court to admit or exclude. No real prejudice has been shown in the exclusion of this merely cumulative item of evidence. 29 Am. Jur. 2d, Evidence § 256, p. 307 (1967 Ed.).

Even, assuming *arguendo,* that some error was committed in this regard, such error clearly was not such as could have influenced the outcome of the case. Hence, if error is found, it must be recognized as "harmless".

D. THE JURY'S AWARD OF DAMAGES IS SUPPORTED BY PROPERLY ADMITTED ECONOMIC DATA

> "Juries, being gifted with the power to put a dollar value on a person's reputation, or his eyesight, or his wife's affections, or even his life itself, should have little trouble with so relatively simple a proposition as measuring in dollars the amount of injury a monopolist . . . or a conspirator has inflicted upon his victim's business or property." Rowley, *Proof of Damages in Antitrust Cases,* 32 A.B.A. Antitrust L.J. 75 (1966).

In accord with this spirit, the Supreme Court has liberally permitted antitrust plaintiffs to introduce as evidence any "relevant data" which would aid the jury

in making a "just and reasonable estimate" of damages which are not capable of precise ascertainment.

Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 565 (1931);

Eastman Kodak Co. v. Southern Photo Co., 273 U.S. 359 (1927);

Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946).

The rationale underlying these cases, in part, is based upon the inherent difficulty in exact measurement of damages in antitrust actions. But an overriding consideration in each case is that the specific ascertainment of a plaintiff's damages is clouded by the illegal and anti-competitive practices of the defendants involved.

In *Bigelow,* the Court stated:

> "In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the *jury may make a just and reasonable estimate of the damage based on relevant data* and render its verdict accordingly. In such circumstances 'juries are allowed to act on probable and inferential as well as upon direct and positive proof' (citing *Story* and *Eastman*). *Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim.* It would be an inducement to make the wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery. The most elementary conceptions of justice and public policy require that *the*

wrongdoer shall bear the risk of the uncertainty which his own wrong has created." 327 U.S. at pp. 264, 265. (Emphasis added.)

In our case, appellee has clearly demonstrated the *fact* of injury, i.e., that appellants' illegal combination foreclosing sources of supply has resulted in the destruction of appellee's business and its elimination from the market. Therefore, the only issue to be resolved is whether the items of evidence offered by appellee constituted relevant economic data which would aid the jury in ascertaining the extent of damages resulting from appellants' illegal anti-competitive combination.

The evidence indicated that between 1958 and 1961 Hawaiian Oke lost nearly $250,000 from its operations. (Tr. 233-234.) In October of 1961, Theodore (Ted) Wong was brought into the business by his father Henry A. Wong who was then president of appellee. Ted Wong had an extensive educational and business background (Tr. 135-141) and was given managerial duties. Under Ted Wong's management, Hawaiian Oke underwent a kind of rehabilitation—a series of significant changes were effected, including but not limited to improved systems of inventory control, establishment of an effective accounting system, reduction of the necessary warehouse space which permitted the sub-leasing of the unneeded area, and the securing of fresh capital for the business. (Tr. 141-145.) Subsequently, appellee was able to acquire the Calvert and Frankfort lines. (Tr. 145-46.) Hawaiian Oke's total operation went from a net loss of $50,179.54 in 1961 to net gains in 1962 ($8,260.80); 1963 ($2,640.11); and 1964 ($2,497.85). (Tr. 541-45.) Moreover, while the

Hawaiian liquor market was generally poor in 1963 and 1964, all prospects for the future, with an anticipated increase in tourism, were bright. (Exh. P-75; Tr. 748-52; 2395.) This is confirmed by a significant increase in Hawaiian Oke's sales in the first three months of 1965 (as compared with the first three months of 1964). (Tr. 1183-84.)

In addition, it must be observed that Hawaiian Oke's performance as a distributor, since being rehabilitated by Ted Wong in 1962, was extremely impressive. Hawaiian Oke's depletions of Calvert brands from 1963 to 1965 far exceeded the performance of earlier distributors (including McKesson) and the later performance by Portside. (Exh. P-106, P-107, P-108, P-109; Tr. 1048-55.)

In one instance, where Hawaiian Oke and McKesson were distributing the same product (Kessler) for Four Roses—appellee's performance was far superior to its competitor. (Exh. P-111.) As was pointed out earlier, this had prompted Four Roses to give the exclusive Kessler distributorship to Hawaiian Oke. (Tr. 1302.) This decision was made only two short months prior to Four Roses' sudden and "mysterious" termination of Hawaiian Oke. (Tr. 1302.)

Hawaiian Oke's distribution of Barton products was even more significant. Barton's Hawaii depletions were increased from 758 cases in 1961 to 5,401 cases in 1964 (approximately a 700% increase), and the outlook for 1965 was even greater. (Exh. P-113.) Significantly, Portside's performance for Barton for the full year of 1966 was below Hawaiian Oke's Barton depletions for the first eight months of 1965. (Tr. 1071.)

The jury, then, was able to observe, in Hawaiian Oke, the picture of a small struggling business in a classic "turnaround" situation. This was a business which, with fresh, young, enthusiastic management, was on the way up—increasing sales and controlling expenses. (Exh. P-3; Tr. 1105-1111.) This was a distributor which was performing well for its suppliers in Hawaii—better than those suppliers had seen before or since.

The suppliers had acknowledged their satisfaction with Hawaiian Oke's performance. (Exh. McK-39; Tr. 793, 1260, 2580.) Yet, as has been shown, these same suppliers, whose Hawaiian business was growing, conspired together and combined with McKesson to terminate Hawaiian Oke. This anti-competitive termination rang the death knell for appellee—destroying its business. Now these appellants, having destroyed a small, struggling, improving business, tell this Court that the damages they caused are unascertainable and thus cannot be assessed.

It is clear that in an antitrust case such as ours, where the jury finds that defendants' anti-competitive acts have caused damage to plaintiff's business, the jury may estimate damage based on relevant data. Moreover, the jury may act on probable and inferential proof. *Story Parchment Co. v. Patterson Parchment Paper Co., supra; Eastman Kodak Co. v. Southern Photo Co., supra; Bigelow v. RKO Radio Pictures, supra; Loew's Inc. v. Cinema Amusements,* 210 F.2d 86, 95 (10th Cir. 1954).

As we shall demonstrate, appellants' contentions as to the inadmissibility of certain evidence relating to damages —really only go to the weight that the jury should have given such evidence. These questions must be left to the

collective wisdom of the jury. As this Court recently observed in *Washington State Bowling Prop. Assn. v. Pacific Lanes, Inc., supra:*

> ". . . a factual question was presented to the jury for its determination which we are without power to change. Nor can we say the verdict is grossly excessive, or such as to shock our conscience." (356 F.2d at p. 379.)

1. The Trial Court Properly Admitted Exhibits and Testimony Relating to Appellee's "Going Concern" Value.

Appellee Hawaiian Oke did not seek lost profits as damages. Instead, appellee sought to recover the difference between the value of the business which was destroyed and the liquidated value actually received. Appellee sought additionally certain "out-of-pocket" losses. (Tr. 39, 2960, 2964.) It is clear that both such items of damage are recoverable. *Story Parchment Co. v. Patterson Parchment Paper Co., supra.*

The United States Supreme Court and this Court have recognized the right of a victim of an antitrust violation to recover the difference between the value of its business as a going concern at the time of the violation and the actual liquidation value after the violation has taken its toll. *Story Parchment Co. v. Patterson Parchment Paper Co., supra; Standard Oil of Calif. v. Perkins,* 1967 Trade Cases 72,265, p. 84,618 at p. 84,622 (9th Cir. 1967). See also: *Atlas Bldg. Prod. Co. v. Diamond Block & Gravel Co.,* 269 F.2d 950, 959 (10th Cir. 1959).

During the course of the trial, appellee offered a great deal of evidence relating to the value of Hawaiian Oke as a "going concern". The jury was shown the financial

statements of Hawaiian Oke including profit and loss statements illustrating its favorable growing business trend. (Exh. P-1.) The jury was shown a prospective sales and profit projection based upon computations of an expert witness. (Exh. P-2, P-3.) The jury was told of the interest of several individuals in purchasing the appellee's business. (Tr. 209-220; 688; 383-386; 1630-1633; 1645-1646.) The jury was informed of the comparative operation of McKesson's Honolulu division, and it was able to compare the amount of business done by McKesson's Portside in 1965-66 (most of which was derived from sales of products formerly supplied to Hawaiian Oke). (Exh. P-4, P-17B, P-122; Tr. 1088.) The jury was able to estimate, based on the competent opinion testimony of experts, as well as officers of appellee and appellants, that the future outlook of the liquor industry in Hawaii was extremely favorable (Tr. 2395) especially with a rise in tourism and appellee's anticipation of distributing Leilani Hawaiian Rum (Tr. 1638-1640; 2212).

Thus the jury was shown the portrait of the appellee as an established liquor distributor in Hawaii with young aggressive management, growing increasingly prosperous, establishing new highs in case sales and ready to capitalize on the anticipated natural growth of its industry. It is submitted that this economic data was abundantly sufficient for the jury to estimate the damage to appellee which resulted from appellants' illegal combination.

In the face of the clear evidence of damage to appellee, appellants challenge the admissibility of some of the relevant economic data which was submitted for the jury's consideration. Appellee will respond *seriatim.*

(a) The Caldwell Exhibits.

(Response to Appellants' Assignment of Error No. 9)

In demonstrating its loss, appellee offered, *inter alia,* evidence relating to the "going concern" value of the business in the form of exhibits prepared by Mr. Grant Caldwell, a certified public accountant. (Exhs. P-2, P-3, P-4 and P-5.) Caldwell was qualified and represented by appellee only as an expert in accounting computations. (Tr. 1140-41.) *Atlas Bldg. Prod. Co. v. Diamond Block & Gravel Co., supra,* at p. 958. It is clear that in determining the "goodwill" or "going concern" value of a business, it is relevant and desirable to investigate prospective profit potential. *Standard Oil Co. v. Moore, supra,* 251 F. 2d at 219; see also: Doyle, *Treble Damages and Counsel Fees;* A.B.A., Antitrust Handbook, p. 549 (1958); Timberlake, *The Legal Injury Requirements and Proof of Damages in Treble Damage Actions,* 30 Geo. Wash. L. Rev. 231 (1961). Caldwell served the purpose of informing the jury of the history and trend of Hawaiian Oke's sales, expenses and profits. It was demonstrated that Hawaiian Oke's annual sales had increased substantially in every year since 1962 when Ted Wong took over managerial duties. (Exh. P-1.) Moreover, although appellee showed a net loss of approximately $50,000 in 1961, it accomplished net gains in 1962, 1963 and 1964 (the last *full* year of its operation). (Tr. 541-45). In calculations based on actual figures for the most recent years, Caldwell demonstrated that Hawaiian Oke's projected *net* income for the calendar year of 1965 (had appellants not combined to destroy its business in mid-year) was $45,256. (Exh. P-2.) This amount was determined by comparing the ratio of appellee's sales during the first six months of 1964 to

total sales for that year and then applying that ratio, using actual sales figures for the first six months of 1965, to the full year of 1965. (Tr. 1092-99; Exhs. S-3, S-4, S-5, McK-24, McK-25.)

In conducting this computation of anticipated net profit for the calendar year 1965, Caldwell utilized his expertise in appraising the figures as to Hawaiian Oke's sales trend and ability to control expenses. (Tr. 1092-99.) Caldwell further stated that he chose the most conservative method of projecting future profits. (Tr. 1173-75.) To Caldwell, again exercising his expertise in accounting, a sales trend is an important means of projecting future profits. (Tr. 1116-18; 1165.) Once a company hits a "break even" point (where sales exceed expenses), then a healthy sales trend becomes the significant factor in determining the profitability of a business. (Tr. 1105-18.) It, then, is enlightening to note that Hawaiian Oke's sales for the first three months of 1965 had increased 17% over sales for the first three months of 1964. (Tr. 1183-84.) From all of this information, Caldwell went on to project the sales trend for 1965-1969. (Exh. P-3.) Again, it must be emphasized that these projections of anticipated profits were *not* put to the jury as the measure of damages. The projections merely served as relevant data for the purpose of permitting the jury to appreciate the future prospects of Hawaiian Oke. These projections, coupled with additional evidence regarding the beneficial effect on the liquor business in Hawaii which would result from an increase in tourism (Tr. 2048, 2395), provided some relevant economic data for the jury in assessing the "going concern" value of Hawaiian Oke. *Standard Oil Co. v. Moore, supra.*

Moreover, additional relevant data was provided for the jury in Exh. P-5 and Caldwell's testimony regarding the business communities traditional utilization of "price-earnings" ratios for assessing the value of a going concern. (Tr. 1146.)[10]

Appellants challenge the trial court's action in permitting the jury to treat Caldwell as an expert witness. (Opening Brief, pages 51-54.) Yet it is clear that Caldwell was qualified as an expert Certified Public Accountant. However, he was not represented as having any expertise as to the appellee's actual business operation or *its specific* "going concern" value, and he *never* undertook to express an opinion on either of those subjects. The jury was instructed to weigh all of these factors (e.g., education, experience, soundness of reasoning, etc.) in appraising expert opinion testimony—even to the extent of rejecting the opinion entirely if they so chose. (Tr. 3193.)

Appellants objected to Caldwell's testimony based upon counsel's legal theory of the case and upon business records of Hawaiian Oke. (Opening Brief, pages 48-49.) Yet it must be accepted beyond dispute that testimony as to past business activities of a plaintiff in an antitrust case is one of the elements to be taken into consideration in determining damages. *Twentieth Century-Fox v. Brookside,* 194 F.2d 846 (8th Cir. 1952).

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[10]Had the jury fully accepted Caldwell's estimate that Hawaiian Oke would earn a net profit of $45,256 in 1965 (Tr. 1105; Exh. P-5), its verdict could have been based on a "going concern" value for appellee of $450,000 (10 times annual earnings). The actual verdict of $65,000 could be supported, however, had the jury found that Hawaiian Oke could be expected to earn only $10,000 or less during 1965. Such a finding is extremely reasonable, indeed somewhat conservative, in light of the relevant economic data submitted for their consideration.

The utilization of counsel's legal theory was not error. For, as this Court has stated:

> "We do not see much difference between the suggested formula as an assist in arriving at just and reasonable damages, and a chart placed on a blackboard in a personal injury case, *where plaintiff's lawyer outlines his computations as to loss of earnings, pain and suffering, and the various other items of damage.* The plaintiff is not required to prove with mathematical certainty the amount of its damage resulting from a defendant's violation of the anti-trust laws." *Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d 709, 714 (9th Cir. 1959.) (Emphasis added.)

As was stated above, Caldwell was represented merely as an expert in accounting and computation, not as an expert in the appraisal of appellee's specific "going concern" value. Appellants admit that they were permitted to cross-examine Caldwell ". . . on the method of computation". (Opening Brief p. 50.) They objected, however, to not being permitted to cross-examine Caldwell as to specifics concerning Hawaiian Oke's value. Since Caldwell neither possessed nor claimed expertise as to the specifics of appellee's operation (Tr. 1072-73; 1091-92; 1179; 1188-90), cross-examination on that point was properly refused.[11] For this reason, *Berguido v. Eastern Air*

[11]Contrary to statements made by appellants in their brief, their cross-examination of Mr. Caldwell was very extensive and generally uninterrupted. The cross-examination of Caldwell consumes nearly one hundred pages of the trial transcript (Tr. 1151-1247), and was conducted for a major part of an afternoon session (March 30, 1967) and a full morning session (March 31, 1967) of the trial. Also, during direct examination, there was extensive voir dire examination (e.g., Tr. 1023-30; 1091-2; 1095-1104; 1131-45) of Caldwell by appellants. Few objections to the questions propounded during the cross-examination of Caldwell by

Lines, Inc., 317 F.2d 628 (3rd Cir. 1964) cited by appellants, is distinguishable from our case.

Thus, it is clear that the exhibits and the computations and projections by Caldwell were admissible as presenting to the jury some relevant economic data from which the jury could estimate what the future profit potential of Hawaiian Oke was for the ultimate purpose of ascertaining what the value of the business as a "going concern" would have been but for appellants' illegal conduct. Courts in antitrust cases have unequivocally accepted the relevancy and propriety of estimated projections of an injured plaintiff's performance to establish damages. *Bigelow v. RKO Radio Pictures, supra; Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 346 F.2d 661 (6th Cir. 1965); *Wm. H. Rankin Co. v. Associated Bill Posters,* 42 F.2d 152 (2d Cir. 1930), cert. denied 282 U.S. 864 (1930); *Twentieth Century Fox v. Brookside, supra; Standard Oil Co. v. Moore, supra.*

In an earlier case, the Second Circuit specifically approved of such evidence when it stated:

> "Complaint is also made about the introduction of proof by the plaintiff through the *testimony of a certified public accountant of a computation he had made from the plaintiff's books of account* to show damages which flowed from the cutting off of its supply of the products of the Frankfort Distilleries. *That was competent evidence.* William H. Rankin Co. v. Associated Bill Posters of United States and Canada, 2 Cir., 42 F.2d 152. *If the computation was incorrect it was sub-*

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appellants' counsel were sustained. Moreover, most of those sustained merely related to questions involving the specific operation of Hawaiian Oke as to which Caldwell was not represented as having expertise.

ject to being overcome by proof to that effect but that did not make it inadmissible.'' Connecticut Importing Co. v. Frankfort Distilleries, 101 F.2d 79, 81 (2d Cir. 1939). (Emphasis added.)

Other objections to the exhibits by the appellants (Opening Brief pp. 54-66) merely go to the weight which the jury should have given to them—not to their admissibility:

(a) Even though Seagram and Barton distributorships were not transferable, the jury could have concluded that a prospective purchaser would have been influenced by the fact that these suppliers were presently with Hawaiian Oke. The jury also could have reasonably concluded that these suppliers would have stayed with Hawaiian Oke even in the event of an acquisition. (Tr. 2669-70.) For this reason and others, men who know the liquor business such as Cotler and Gonzales recognized that established liquor distributors do have a ''going concern'' value. (Tr. 383-86; 1645-46.)

(b) Even though some of the projections were based on figures which included some income from the leasehold, the figures upon which profit projections were based also included *expenses* of the leasehold. (Tr. 2061.) Moreover, the existence and extent of leasehold income was shown to the jury so that they could weigh it in relation to the projections. (Exh. P-1; Tr. 239-271; 1132-34; 2063-70.) The evidence presented by Caldwell related only to the damage to the ''going concern'' value of appellee's liquor distributorship. The leasehold had no significance to this issue.

(c) Appellants contended that the ratio of the first six months sales to full year sales was invalidated for calendar year 1965 because of an alleged unusually large volume of sales (for tax reasons) in June of 1965. Again, this factor was pointed out for the jury to consider in assessing the probative weight of the projections. (Tr. 1242.) However, it was also demonstrated that greater sales in the second half of the year are attributed to the "Christmas-New Year" holiday season; *and in 1965, in spite of a similar tax buying spree for McKesson (appellee's competitor) in June of 1965, its sales in the second half of 1965 were higher than in the first half*—as was the pattern of Hawaiian Oke's sales in all prior years. (Tr. 1789-93; Exh. P-123.) The jury could well have concluded that had Hawaiian Oke been free from illegal restraint its sales in late 1965 would have exceeded sales for the first half of 1965—consistent with the pattern of earlier years.

Even appellants' expert witness, S. W. Vasquez, admitted that the projected sales for 1965 by Hawaiian Oke would exceed the 1964 sales by nearly 5%. (Tr. 1740.) And the increase, he admitted, would have been much greater if Hawaiian Oke's sales in the second half of 1965 could have *equaled* sales for the first half. (Tr. 1798.) Vasquez also admitted following the same format and methodology of computation as utilized by Caldwell, although he disagreed with the actual figures. (Tr. 1772-73.)

Appellants, in their Brief, frequently allude to the 1962 case of *Volasco Products Co. v. Lloyd A. Fry Roofing Co.,*

308 F.2d 383 (6th Cir. 1962), in condemning "speculative evidence" of damages. They fail to note, however, that in 1965—in the second *Volasco* case—the Sixth Circuit specifically approved of the use of "* * * a mathematical projection based on the prior business of the plaintiff." *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 346 F.2d 661, 666 (6th Cir. 1965). That Court went on to say that such "* * * calculations are reasonable and that they give the jury a basis upon which to form a judgment."

Considering all these factors, then, it was proper to admit the exhibits and Caldwell's testimony. The figures and projections were not presented to give the jury a false impression of exactitude, but merely to present relevant information which would help them *estimate* appellee's damage.

> "Damages in such a situation necessarily cannot be assessed with mathematical precison; but the testimony of plaintiff's expert witness * * * while purely an estimate and introduced as such, was proof of a kind as definite and certain as the subject-matter admitted." *Richfield Oil Corp. v. Karseal Corp., supra,* at p. 714, citing *Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc., supra,* and *Wm. H. Rankin Co. v. Associated Bill Posters, supra.*

(b) Comparison of Profits Earned by McKesson
(Also in Response to Appellants' Assignment of Error No. 9)

In their Brief, appellants challenge the utilization of comparative profit figures of appellee's competitor—McKesson & Robbins (Honolulu Division), as relevant data bearing on the issue of damages. (Opening Brief, pages 64-66.) However, it is clear that evidence comparing the income and earnings of plaintiff's competitors who are

free from the anti-competitive restraints of the antitrust violation is relevant and admissible to aid the jury in ascertaining the extent of the damages incurred by the injured victim of the illegal restraint. *Bigelow v. RKO Radio Pictures, supra.* The justice of admitting such comparative figures is even more compelling in cases where the competitor is a party to (or favored by) the antitrust violation. *Milwaukee Towne Corp. v. Loew's, Inc.,* 190 F.2d 561 (7th Cir. 1951); *Haverhill Gazette v. Union Leader,* 333 F.2d 798 (1st Cir. 1964); *Wm. Goldman Theatres v. Loew's, Inc.,* 69 F.Supp. 103 (E.D. Pa. 1946), *aff'd,* 164 F.2d 1021 (3rd Cir. 1948) *Cert. denied,* 334 U.S. 811 (1947).

Appellants recognize the authority of these rulings, but state that no "sound" or "rational" basis for comparing McKesson with Hawaiian Oke existed. (Opening Brief, p. 65.) Appellants primarily cite *Flintkote v. Lysfjord, supra* and *Volasco Products Co. v. Lloyd A. Fry Roofing Co.,* 308 F.2d 383 (6th Cir. 1962) as authority for their position. Our case is significantly distinguishable from both.

In *Flintkote* this Court rejected estimations of what future profit could be made by a newly created business in its infancy based solely upon testimony of plaintiffs who were inexperienced in the management of the business. The testimony related to the maximum amount of money these plaintiffs had made working as salesmen for an established firm, "* * * with no attempt having been made to establish a comparison as to either the businesses or the years * * *" of operation. 246 F.2d at p. 394. Similarly, in *Volasco,* the evidence was not suf-

ficient to probatively demonstrate the capabilities of plaintiff's management and prospective sales performance.

However, in our case, a relevant basis for comparison between McKesson and Hawaiian Oke was established. The jury was apprised of the relatively equal business and educational background of the appellee's manager, Ted Wong, and McKesson's manager, Abe Kauhane; if anything—Wong's credentials were superior. (Tr. 135-145; 2354-2359.) The jury was informed of the entrepreneurial skill of Wong in rehabilitating appellee, after taking his managerial position in late 1961. (Tr. 233-242; Exh. P-1.) Moreover, both organizations served the same geographical market. (Tr. 2367.) The comparative sales ability of the two organizations was appropriately demonstrated to the jury by figures showing appellee Hawaiian Oke's superior performance in the distribution of similar or identical products. (See, for example, Exh. P-106-P-114.) These comparative sales figures demonstrated that Hawaiian Oke's performance was superior to that of McKesson in distributing Calvert products (Tr. 1048-1060); that Hawaiian Oke was favored over McKesson as exclusive distributor of Four Rose's Kessler line on the basis of appellee's superior contemporaneous experience over McKesson in the sale and distribution thereof (Tr. 1302). Furthermore, McKesson's prior distribution of Frankfort's McKenna line was unsatisfactory in comparison to Hawaiian Oke's performance. (Exh. P-83; Tr. 1580-1586.) Appellee's experience with Barton was also significant. The sales increase from 1961 (when Hawaiian Oke took over the line from McKesson), to 1964 was 700%, and included a higher ratio of more profitable

items ("brown goods") than McKesson's pre-1961 performance or Portside's 1966 performance. (Tr. 1071; Tr. 813-817; Exh. P-19, P-116, P-117.)

All these comparative factors unequivocally demonstrate that in management and sales performance the "new" Hawaiian Oke, under the leadership of Ted Wong was an organization with a sales and profit potential *at least* equal to McKesson's. Arguments and evidence proffered by appellants as to McKesson's superiority go merely to the *weight* of the comparison, not to its inherent probative relevance and validity. (Thus, this Court's decision in *Wolfe v. National Lead Co.*, 225 F.2d 427 (9 Cir. 1955) is distinguishable.) The jury was apprised of Hawaiian Oke's rental income (Tr. 1132-1134) as it related to the comparative performance and the fact that comparative figures were mathematical computations based on the financial statements of the two Hawaiian distributors rather than on a personal analysis of the actual operation of each (Tr. 1138-1140). The jury was thus able to assess the weight it believed that the testimony and exhibits comparing Hawaiian Oke and McKesson deserved. (Tr. 3192-3194.)

Moreover, as one of the leading decisions in this field makes clear, exact similarity of the two businesses is not necessary to establish and use comparative performance figures. *Wm. Goldman Theatres v. Loew's, Inc., supra.* All that is necessary is that the comparison illuminate for the jury the business potential of the appellee had it not been victimized by the illegal terminations of the distiller-appellants. In *Goldman* the competitor whose business (theatre) was used as a yardstick operated a

facility which was larger, newer, more elegantly appointed and situated in a better location. Although all of these factors represent extremely important variables in the theatre business, the comparison was allowed and the differences demonstrated merely went to the probative weight to be given to the business statistics involved.

As already noted, the present case presents a much clearer justification for use of comparative business figures. Therefore, the evidence relating to McKesson business was competent as relevant economic data to be weighed by the jury in estimating the extent to which appellants' illegal combination damaged the value of Hawaiian Oke's business.

Moreover, the jury also had before it the actual figures relating to total sales in 1966 by McKesson's second house—Portside. (Exh. P-178, P-122.) Inasmuch as 87.4% of Portside's liquor business was derived from former suppliers of Hawaiian Oke (Tr. 1088), the jury could properly utilize this data as relevant information to aid in their estimation of the volume of business Hawaiian Oke might have done had it been permitted to operate free from anticompetitive interference. *Haverhill Gazette v. Union Leader, supra.*

It was recognized, in the *Haverhill Gazette* case, that where the very existence of plaintiff's competitor is part of an illegal plot, and business acquired by that competitor was lost by plaintiff, such business becomes a part of the damage. Here appellee must be permitted to recover all losses to which defendants' conduct "substantially contributed." *Haverhill Gazette v. Union Leader, supra,* 333 F.2d at pages 806-807; Restatement, Torts, Sec. 431.

(c) Evidence of Expressions of Interest in Purchasing the Business of Hawaiian Oke.

(Response to Appellants' Assignment of Error No. 10)

Appellants cite as error the admission of testimony and a letter relating to the interest of third parties in purchasing the business of Hawaiian Oke. (Opening Brief, pages 66-67.) Appellants contend that this evidence was prejudicial error, but cite merely one case as authority. *Dantzler v. Dictograph Products, Inc.,* 309 F.2d 326 (4 Cir. 1962). *Dantzler* is clearly distinguishable from our case.

In *Dantzler,* the plaintiff was the *only witness* in his own behalf and testified as to his estimate of damage caused by the loss of several customers. 309 F.2d at p. 328. Nothing in that case related to the value of a business or the probative weight of offers to buy a business.

On the other hand, in our present case, testimony as to interest of prospective purchasers was but one item of many which were put to the consideration of the jury in estimating the value of plaintiff's business. The testimony of Ted Wong (coupled with a letter, Exh. P-54) that five different individuals had expressed an interest in purchasing Hawaiian Oke was a relevant consideration. (Tr. 209-220.) Such testimony becomes even more significant upon noting that McKesson, itself, was apparently considering the acquisition of Hawaiian Oke (Exh. P-71; Tr. 688), and the recognition by McKesson that in such acquisitions the purchaser and seller must negotiate a price (Tr. 386). The inference is clear—that established businesses, even those which are merely "breaking even" have a "going concern" value in excess of liquidation value. (Tr. 385-386.)

The most significant evidence on this issue, however, was the testimony of Mr. E. Gonzales, formerly Assistant to the President of Jos. E. Seagram, and later National Sales Manager for Calvert. Gonzales, a man with extensive experience in and knowledge of the liquor industry, related his interest in acquiring Hawaiian Oke and mentioned a figure of $360,000 in this connection. (Tr. 1645-46.) However, Ted Wong was not interested in selling. (Tr. 1646.) Even as late as May of 1965 Gonzales expressed his interest in purchasing Hawaiian Oke to Murphy (Calvert), whose reply was, "Not a chance." (Tr. 1647.)

There was also testimony from Francis Lindus, a potential prospective purchaser (Exh. P-82) that in looking for a profitable liquor distributorship, Hawaiian Oke would be one to consider (Tr. 1816). All of this evidence, taken together, is entitled to be considered by the jury. Moreover, Ted Wong's refusals to sell evidence the firmness of his opinion as to the value and future potential of Hawaiian Oke as a successful and profitable business enterprise. Such testimony is clearly admissible as relevant economic data to aid the jury. *Rangen, Inc. v. Sterling H. Nelson & Sons*, 351 F.2d 851, 856 (9 Cir. 1965); *Union Carbide & Carbon Corp. v. Nilsey*, 300 F.2d 561 (10 Cir. 1961); *Wm. H. Rankin Co. v. Associated Bill Poster*, 42 F.2d 152, 155 (2 Cir. 1930).

2. The Court Properly Admitted Evidence of Appellee's Out-of-Pocket Losses.
(Response to Appellants' Assignment of Error No. 11)

As pointed out above, the evidence of diminution of the "going concern" value of Hawaiian Oke was alone sufficient to support the jury's verdict. However, the jury was also permitted to consider the "out-of-pocket" losses suffered by the appellee which were occasioned by appellants' illegal combination. Damages for these two different and distinguishable types of losses are not mutually exclusive. *Story Parchment Co. v. Patterson Parchment Paper Co., supra.*

During July of 1965, as a result of the distiller-appellants' combined termination of Hawaiian Oke, it became necessary for Hawaiian Oke to begin to "phase out" its operation. (Tr. 273.) Attempts were made by the Hawaiian Oke management to secure additional liquor lines to replace those of the distiller-appellants. (Tr. 288-307.) Of course in making these attempts and in ultimately phasing out the business, it became necessary to temporarily continue the existing organization of Hawaiian Oke and pay rent, salaries, taxes, etc., in order to salvage any value at all upon liquidation. The evidence showed that the illegal terminations substantially contributed to the resulting loss of $35,000 which Hawaiian Oke sustained in 1965. (Tr. 544.) The evidence, already fully summarized elsewhere in this brief, indicated that 1965 would have been a profitable year for Hawaiian Oke but for the illegal terminations. Therefore, it is clear that the appellants' anti-competitive combination substantially caused the appellee's out-of-pocket loss of $35,000 sustained prior to liquidation. (Tr. 544; Exhs. P-1, P-2, P-5, P-6.)

This Court has made it clear that a victim of an antitrust violation is entitled to recover "out-of-pocket" expenses incurred as the reasonably probable result of the defendants' conspiracy. *Flintkote Co. v. Lysfjord, supra,* 246 F.2d at pages 389-392. The evidence described above and the reasonable "common sense" inferences to be drawn therefrom compel us to recognize that when, as here, four major suppliers combined to terminate a liquor distributor, some measure of out-of-pocket damage naturally resulted to the appellee in the interim between the perpetration of the conspiracy and the ultimate demise and liquidation of the victim.

Perhaps this "common sense" factor underlies the liberality of Supreme Court decisions which permit reasonable jury estimations of antitrust damages. *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359 (1927); *Story Parchment Co. v. Patterson Parchment Paper Co., supra; Bigelow v. RKO Radio Pictures, Inc., supra.* Referring to these cases, the Court recently stated:

> "Where plaintiff proves a loss, and a violation by defendants of the antitrust laws of such a nature as to be likely to cause that type of loss, there are cases which say that *the jury,* as the trier of the facts, *must be permitted to draw from this circumstantial evidence the inference that the necessary causal relation exists." Continental Ore Co. v. Union Carbide & Carbon Co., supra,* 370 U.S. at p. 697 (also citing *Bordonaro Bros. Theatres v. Paramount Pictures, supra* and *Atlas Bldg. Prod. Co. v. Diamond Block & Gravel Co., supra.* (Emphasis added.)

As was ruled in the case of *Haverhill Gazette v. Union Leader, supra,* appellee may recover losses to which de-

fendants' conduct substantially contributed even though there are other causes for the loss. Restatement, Torts, Sec. 341.

E. THE TRIAL COURT DID NOT ERR IN GIVING AND REFUSING CERTAIN INSTRUCTIONS ON THE ISSUE OF DAMAGES

1. Instruction Permitting Consideration of Future Profits. (Response to Appellants' Assignment of Error No. 12)

Appellants challenge the propriety of permitting the jury to consider the loss by appellee of future profits without further instruction that appellee was making no claim for such profits. (Opening Brief, p. 68; Appendix, p. xxiv.)

The trial court's instruction was proper. The jury was told that if it found "that the plaintiff is entitled to some damages, it would be proper for "plaintiff to recover the difference, if any, between the value of its business at the time of the injury, and the amount of money which the stockholders actually received as a result of the liquidation * * *". (Tr. 3216-3217.) The jury was specifically told that in calculating the value of Hawaiian Oke's business, it could look to all the relevant facts relating to the issue, including testimony, exhibits, past profits or losses, the trend of the business, and/or "* * * the evidence which bears on the question of future profits or losses." (Tr. 3216-3217.)

Thus, the jury was expressly instructed that the question of future profits or losses was of relevance in relation to the ascertainment of the Hawaiian Oke's "going concern" value. This properly states the appli-

cable law. *Story Parchment Co. v. Patterson Parchment Paper Co., supra; Standard Oil of Calif. v. Perkins, supra; Atlas Bldg. Products Co. v. Diamond Block & Gravel Co., supra.*

Therefore the instruction given was proper and complete and the trial court committed no error in refusing appellants' proposed instruction MC. (R. 362; Tr. 3122-3123.) *Employer Liability Assurance Corp. v. Maes, supra.*

2. Instruction Permitting Consideration of the Interest of Prospective Purchasers of Hawaiian Oke's Business. (Response to Appellants' Assignment of Error No. 13)

The jury was instructed that it would be proper to consider "* * * the evidence relating to the interest of third persons in purchasing the plaintiff's business and, in fact, as to whether there was a market for the plaintiff's business at all." (Tr. 3217.)

As pointed out, above, there was a substantial amount of evidence of interested, prospective purchasers of Hawaiian Oke. Some of these indications of interest came from individuals with experience and knowledge of the Hawaiian liquor market. There were clear indications that in purchasing such a business, a price in excess of liquidation value could be commanded. (Tr. 385-386; 1645-1646.)

Such testimony, then, must clearly be recognized as relevant economic data which would aid the jury in estimating the fact and extent of appellee's loss, *Rangen, Inc. v. Sterling H. Nelson & Sons, supra,* and in establishing "* * * whether there was a market for plaintiff's business at all." (Tr. 3217.) The instruction, then,

properly stated the applicable law and could not constitute prejudicial error. *Rangen, Inc. v. Sterling H. Nelson & Sons, supra; Union Carbide & Carbon Corp. v. Nilsey, supra; Wm. H. Rankin Co. v. Associated Bill Posters, supra.*

3. Instruction Permitting Consideration of Appellee's Out-of-Pocket Losses.
(Response to Appellants' Assignment of Error No. 14)

As stated above, substantial evidence was presented concerning the out-of-pocket losses suffered by Hawaiian Oke in connection with the "phasing out" of its operation and the liquidation of its business. The trial court, then, properly instructed the jury that it could consider such out-of-pocket losses, if it found that any were incurred as a result of appellants' conduct. (Tr. 3217.) *Story Parchment Co. v. Patterson Parchment Paper Co., supra; Flintkote Co. v. Lysfjord, supra; Haverhill Gazette v. Union Leader, supra.*

4. Instruction Permitting Consideration of the Caldwell Testimony and Exhibits As Expert Opinion; and Refusal of Instruction That Such Exhibits Were Representations of Counsel for Appellee.
(Response to Appellants' Assignment of Error No. 15)

As was stated above, Mr. Caldwell was a certified public accountant. (Tr. 1140-1141.) It is clear that, as such and to that extent, Cadlwell's testimony could properly be treated as reflecting accounting expertise. *Connecticut Importing Co. v. Frankfort Distilleries*, 101 F.2d 79, 81 (2nd Cir. 1939); *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 346 F.2d 661, 666 (6th Cir. 1965); *Richfield Oil Corp. v. Karseal Corp., supra; Milwaukee Towne*

Corp. v. Loew's Inc., supra; Arthur Murray, Inc. v. Oliver, 364 F.2d 791 (8th Cir. 1966); *Reserve Plan v. Arthur Murray, Inc.,* 262 F.Supp. 565 (W.D. Mo. 1967); *Twentieth Century-Fox v. Brookside,* 194 F.2d 846 (8th Cir. 1952).

Moreover, the trial court in instructing the jury cautioned that Caldwell was merely an expert in accounting generally and expressly distinguished appellants' expert witness, Mr. Vasquez noting that he was more specifically "* * * presented as an expert economic analyst in the field of the liquor industry." (Tr. 3193.) In addition, the jury was instructed that they should weigh the education, experience and reasoning of the experts and the exhibits which they prepared, and assign probative weight to their testimony and exhibits accordingly, even to the extent of rejecting the expert's opinion entirely. (Tr. 3193-3194.)

The jury was informed, by testimony during trial, that Caldwell had no direct specific knowledge regarding the operation of the appellee's business (Tr. 1072-3; 1091-2; 1179; 1188-90), and that Caldwell's testimony was based on his examination of the unaudited business records and financial reports of Hawaiian Oke. (Tr. Exh. P-1, P-118-121; 1018-23; 1092-3; 1157-65; 1167-1179; 1188-1190.)

Thus under the instructions given the jury was properly told to weigh these matters in assessing the value of the expert testimony. Such clearly represents the applicable law. *Richfield Oil Corp. v. Karseal Corp.,* 271 F.2d 709, 714 (9 Cir. 1959); *Wm. H. Rankin Co. v. Associated Bill Posters, supra.* Therefore the trial court properly instructed the jury and committed no error in refusing

to give Barton's proposed Instruction No. 51 (R. 359; Tr. 3031-3032.) *Employers' Liability Assurance Corp. v. Maes, supra.*

5. The Trial Court's Refusal to Give Barton's Proposed Instruction No. 50 and McKesson's Proposed Instruction No. 11 Relating to Appellee's Rental Income.
(Response to Appellants' Assignment of Error No. 16)

During the trial appellants repeatedly alluded to the rental income derived by Hawaiian Oke. The exact amount of such income was designated separately on appellee's financial statement. (Exh. P-1.) It so happened that the rent-related expenses (taxes, utilities, maintenance, insurance, etc.) which would offset these gross-income figures were not separately listed under the appellee's accounting procedures. (Tr. 2063-2066.) The jury was made fully aware of the amount of rental income Hawaiian Oke derived, and was permitted to consider this as a factor in assessing the operational performance of the liquor distributing business.

The relevant economic data submitted through the various witnesses presented by appellee—notably Wong, Caldwell and Gonzales—bore entirely on the value of the liquor distributorship as a "going concern" without regard to the rental income. Caldwell's most significant testimony was his historical and prospective analysis of appellee's liquor *sales* performance.

Thus the fact that Hawaiian Oke enjoyed some amount of rental income and that the leasehold was held in trust for the benefit of Hawaiian Oke shareholders by Thelma Wong (Tr. 2607-08) was unimportant to the crucial issue

of the "going concern" value of appellee's liquor distributorship business at the time the appellants illegally combined and thereby destroyed said business.

The instructions proposed by appellants (Barton's Instr. No. 50; R. 358 and McKesson's Instr. No. 11, R. 361) would have specifically prohibited the jury from considering the rental income which Hawaiian Oke derived in regard to the damage issue. *This would have distorted the damage picture inasmuch as the rent-related expenses would then have been assessed solely against the liquor operation.* Therefore, because the proposed instructions would not have properly guided the jury, and could not have been given without qualification, the trial court did not err in refusing them.

> "* * * a party cannot claim error in the refusal to give a requested instruction which is not entirely correct, or which is not possible to give without qualification, or which is so framed as to be capable of being misunderstood." *Cherry v. Stedman, supra,* 259 F.2d at pages 777-778. See also *Ursich v. La Rosa, supra.*

Even if this Court believes that the appellants' proposed instructions did meet the above standard, refusal to give them was not error. The question of rental income and expenses merely went to the weight to be given by the jury to the appellee's financial statements. The trial court properly instructed the jury and covered the material issue of the need to consider all the relevant economic data as a whole. (Tr. 3216-3217.) Thus, the refusal of appellants' proposed instructions was not prejudicial. *Employers' Liability Assurance Corp. v. Macs, supra.*

6. The Trial Court's Refusal to Give Barton's Proposed Instruction No. 52 Relating to the Value of a Business. (Response to Appellants' Assignment of Error No. 17)

The trial court instructed the jury to "* * * make a just and reasonable estimate of the damage based on all relevant economic data." (Tr. 3216.) The jury was further instructed that appellee could "* * * recover the difference, *if any* * * *" between the value of its business at the time of the injury and the amount stockholders received in liquidation. (Tr. 3216.) The jury was also told to consider evidence relating to past profits *or losses,* prospective profits *or losses,* and "* * * the trend of the plaintiff's business, whether it was improving *or deteriorating.*" (Tr. 3216-3217.) (Emphasis added.)

Had the jury found that the trend of appellee's business was deteriorating and that the future held only the prospects of financial losses then it would have been compelled to recognize that the destruction of Hawaiian Oke's business was a blessing in disguise and hence, no damages would have been awarded. Therefore, Barton's proposed Instruction No. 52 (R. 360)—that a business is not necessarily worth more while operating—was superfluous. Moreover, it is argumentative in light of *Story Parchment Co. v. Patterson Paper Parchment Co., supra.*

It was not error for the trial court to refuse the instruction in question. *Ursich v. La Rosa, supra; Cherry v. Stedman, supra; Employers' Liability Assurance Corp. v. Maes, supra.*

F. THE TRIAL COURT COMMITTED NO ERROR AND APPELLANTS WERE NOT PREJUDICED BY INSTRUCTIONS AND RULINGS CONCERNING COMBINATIONS BETWEEN THE UNINCORPORATED DIVISIONS OF THE HOUSE OF SEAGRAM, INC. AND THE PARTICIPATION OF JOSEPH E. SEAGRAM & SONS, INC. THEREIN.

(Response to Appellants' Assignments of Error Nos. 6 and 7)

1. The Entire Issue Concerning the Legal Capacity of the Unincorporated Divisions of the House of Seagram, Inc. to Combine or Conspire With Each Other Has Been Rendered Moot by the Jury's Finding that All of the Corporate Defendants Combined With Each Other in a Single Conspiracy.

It has long been established that alleged errors in a charge may be cured, or may be rendered harmless or immaterial by the verdict. 53 Am.Jur. Trial § 840. Under the Court's instructions read as a whole, the jury was told it could have found that one or more divisions of the House of Seagram, Inc. conspired with Joseph E. Seagram & Son, Inc., Barton and McKesson. And the verdict establishes that it so found. It is, therefore, impossible for appellants to argue that the instruction regarding the legal capacity of unincorporated divisions to conspire with each other (even if it were assumed to be wrong) could be *prejudicial.*

In *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.,* 370 U.S. 19 (1962), plaintiff, a processor of oranges, sued Sunkist and one of its subsidiary corporations (Exchange Orange) charging conspiracy in violation of Sections 1 and 2 of the Sherman Act. The jury returned a verdict for the plaintiff. Plaintiff contended that these Clayton and Capper-Volstead Acts immunized co-operatives combined and conspired with independent processors. The Court instructed the jury that it was to return a verdict for the defendants

"unless you find . . . from the preponderance of the evidence, that Sunkist or Exchange Orange or either of them combined or conspired with either Tree Street or Silzle or Exchange Lemon Products . . ." Exchange Lemon was another subsidiary co-operative in the Sunkist structure.

The defendants argued that the instruction of the court would have permitted the jury to find a conspiracy between three antitrust immunized co-operatives. This Court rejected the argument and further found that any objection to the instruction was waived. (284 F.2d 1; 9th Cir. 1960.) The Supreme Court agreed with Sunkist and reversed, holding that the "theory of liability upon which the general verdict *may* have rested—a conspiracy among petitioners and Exchange Lemon— . . ." was "erroneous". (370 U.S. at 29-30; emphasis added.) Because the instruction *may* have permitted the jury to find against the defendants on an erroneous legal theory, it was prejudicial and a reversal required.

However, in our case, the "separate division" instruction—even if assumed to be erroneous—did *not* set out a theory upon which this general verdict *may* have rested—the instruction becomes moot and error, if any, is harmless rather than prejudicial. And in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 469 (1962), the Supreme Court refused to decide the intra-corporate conspiracy issue in an antitrust case which could have been resolved in favor of the plaintiff on a different theory of liability.

2. The Instructions, As Given, Were Correct.

The appellants have argued that Section 1 of the Sherman Act does not prohibit a combination by and between separate divisions of a single corporation. (Opening Brief, p. 13 et seq.) In addition, they have argued that Section 1 would not even prohibit a parent corporation (i.e., Joseph E. Seagram) from directing such divisions of a separate subsidiary corporation (i.e., House of Seagram, Inc.) to change their distributor. (Opening Brief, Appendix at pp. xv, xvi.)

The trial court found that Calvert, Four Roses and Frankfort (which are the three unincorporated divisions involved herein) are separate marketing entities which compete with each other. The presence of this intra-corporate competition, then, is the distinguishing factor between our case and the numerous cases and hypothetical examples cited by appellants in their brief. (Opening Brief, pp. 13-20.) Our case does not involve a vertical combination between the corporation and its officers [*Nelson Radio & Supply Co. v. Motorola,* 200 F.2d 911 (5th Cir. 1952)], nor a vertical combination between the corporation (House of Seagram, Inc.) and its divisions [*Poller v. Columbia Broadcasting System, Inc.,* 284 F.2d 599 (D.C. Cir. 1960), reversed on other grounds, 368 U.S. 464 (1962)[12]; *Deterjet Corp. v. United Aircraft Corp.,* 211 F.Supp. 348 (D. Del. 1962)].

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[12]In reversing, the Supreme Court expressly left open the question of whether the intra-corporate autonomy of divisions makes them separate entities with legal capacity to conspire with one another in violation of §1 of the Sherman Act. 368 U.S. at p. 469. Thus the Supreme Court refused to leave standing the rule of the Court of Appeals here urged by appellants.

In the present case, the unincorporated divisions involved were in active competition with each other. Each such division within the House of Seagram, Inc. was re-referred to as a "company" and each had its own chief executive who reported directly to Mr. Edgar Bronfman, President of Joseph E. Seagram & Sons, Inc. [Note: they did not report to a superior within their same corporate entity, House of Seagram, Inc.] (Tr. 948-949.) Bronfman, himself, testified that the operations of these divisions and their marketing procedures were autonomously conducted. (Tr. 961.)

Each division has its own officers and chain of command (Tr. 2647) and each is responsible individually and independently for decisions as to selection of distributors. (Tr. 2648.) Moreover, each division makes its own independent decisions regarding pricing, advertising, and other marketing policies. (Tr. 2646-2648.) As Roy Flint (Executive Vice President of Frankfort) testified, referring to relationships between divisions: "They run their business and we run ours." (Tr. 1577.)

The various divisions market products which are similar and competitive. (Tr. 2647.) Indeed, it may be recalled that Arthur Murphy (President of Calvert) insisted upon McKesson opening a second house so that Calvert products and competitive Seagram products (especially 7-Crown and Seagram V.O. marketed by the Seagram division and distributed through McKesson's original Hawaiian house) would not be handled by the same wholesale house. (Tr. 1439-1441.)

Thus, appellants' contention (Opening Brief, p. 15) that the unincorporated divisions of The House of Sea-

gram "... have no more independent existence than the clothing department and the furniture department of a retail store ...", is incorrect. Those departments within a retail store do not actively and openly compete with each other. As Jack Yogman (Executive Vice President of Joseph E. Seagram) admitted, the unincorporated divisions of The House of Seagram are self-contained competing units which fight each other as hard as they fight non-Seagram affiliated competitors. (Tr. 971.)

The trial court, then, properly applied Section 1 of the Sherman Act which outlaws every such combination in the form of trust *or otherwise.* The authority relied on by the trial court dates as far back as *Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1 (1911), which admonishes that in enforcing the antitrust laws, the courts must be concerned with substance not form. The judiciary is entrusted with the important public policy of insuring against *every form* of anti-competitive combination. The United States Supreme Court recently has condemned the chary application of the antitrust laws in such a manner as to elevate form over substance. *Albrecht v. Herald Co.,* 88 S.Ct. 869 (1968).

Appellants argue that these separate divisions have no stockholders, assets or liabilities; that their employees are paid by Seagram and freely shifted from one division to another. (Opening Brief, p. 15.) In so doing, appellants have gone outside the record to discuss various irrelevant aspects of Seagram's corporate structure. Finally they allude to the loss of certain tax advantages available to multiple corporations and to the fact that the assets of their single corporation are available to anyone with a

cause of action against any one of the divisions. (Opening Brief, p. 19.) While these matters (all of which are *de hors* the record) may be of some significance in a tax dispute or some other controversy, they should be recognized as immaterial to the present case. The salient facts are that these divisions competed with each other and by combination had the market power to bring about the anti-competitive result wrought in the present case.

As the court below observed the separateness of the divisions in pursuing sales and marketing functions is the critical fact in this case. The antitrust violation charged relates to the illegal termination of Hawaiian Oke as the sales representative of the distiller-appellants (including the involved unincorporated divisions). Just as a business decision in favor of separate corporate existence bears certain consequences under the antitrust laws, so also must a business decision that separate divisions should remain autonomous and compete with one another. This Court must see through the formalistic veil of corporate unity erected here and recognize the separateness of the divisions in their sales and marketing practices—which was the critical aspect of the business operation from appellee's point of view. For as the United States Supreme Court stated in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951):

> ". . . common ownership and control does not liberate corporations from the impact of the antitrust laws. *e.g., United States v. Yellow Cab Co.,* 332 U.S. 218 (1947). The rule is especially applicable where, as here, respondents hold themselves out as competitors."

VII

CONCLUSION

For the reasons set forth herein, the judgment of the District Court should be affirmed.

Moreover, with respect to this appeal, plaintiff-appellee prays that this Court award it the costs of this appeal and a reasonable attorney's fee. *Twentieth Century Fox Film Corp. v. Goldwyn,* 328 F.2d 190 (9th Cir. 1964).

Dated, San Francisco, California,
May 24, 1968.

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Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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(Appendix Follows)

Appendix

Appendix

APPELLEE'S RESPONSES TO APPELLANTS' ASSIGNMENTS OF ERROR

Appellants' Assignment of Error	Appellee's Responsive Argument	Page in Appellee's Brief
No. 1	Argument A	p. 29
No. 2	Argument C-1	p. 56
No. 3	Argument C-2	p. 58
No. 4	Argument C-3	p. 60
No. 5	Argument B-1	p. 49
No. 6	Argument F	p. 91
No. 7	Argument F	p. 91
No. 8	Argument B-2	p. 51
No. 9	Argument D-1(a), (b)	pp. 68, 75
No. 10	Argument D-1(c)	p. 80
No. 11	Argument D-2	p. 82
No. 12	Argument E-1	p. 84
No. 13	Argument E-2	p. 85
No. 14	Argument E-3	p. 86
No. 15	Argument E-4	p. 86
No. 16	Argument E-5	p. 88
No. 17	Argument E-6	p. 90